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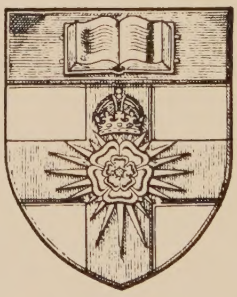

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THE

LAW REPORTS.

Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. III.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

BISHOP OF NATAL *v.* GLADSTONE.

M. R.

1866

June 18, 19, 20; *Nov.* 6.

Colonial Bishop—Letters-patent—Coercive jurisdiction—Endowment—Trustee and Cestui que Trust.

Funds were subscribed and vested in trustees in *England* for the creation and endowment of a bishop of the United Church of *England* and *Ireland* in *Natal*—a colony having an independent Legislature,—and the Crown, on the application of the trustees, appointed the Plaintiff bishop of the see or diocese of *Natal* by letters-patent purporting to give him coercive jurisdiction over his clergy, and to make him subject to the Bishop of *Cape Town* as his metropolitan. The Plaintiff was consecrated in 1853. A suit was instituted by the Plaintiff to obtain payment of the income of the endowment. The trustees alleged by their answer that the effect of the judgment of the Judicial Committee *In re Bishop of Natal* (1) was that, inasmuch as no coercive jurisdiction could be given to a bishop in a colony possessed of an independent Legislature, the letters-patent had failed to create a legal see or diocese, and thus the objects of the subscribers had *failed*:—

Held, that the Plaintiff retained his legal *status* as Bishop of *Natal* notwithstanding the said judgment; that though the letters-patent had failed to confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil Courts; and that, as no allegation was raised in the pleadings against the Plaintiff's character or doctrine, he was entitled to the income of the endowment.

Semble, if the Defendants had raised a case of false or erroneous teaching against the Plaintiff, the Court would either have suspended its judgment until after the result of proceedings by *scire facias* to repeal the letters-patent, or by petition to the Sovereign in Council; or else have itself decided the question in the present suit.

(1) 3 Moo. P. C. (N.S.) 115: 11 Jur. N.S. 353

See also Bishop of Natal v. Bishop of Capetown 3 P.C. 10

M. R.

1866

BISHOP OF NATAL v. GLADSTONE.

The effect of the judgments in *Long* v. *Bishop of Cape Town* (1), and *In re Bishop of Natal* (2), on the church in the colonies and the *status* of colonial bishops, considered.

THE Plaintiff in this suit was the Right Rev. *John William Colenso*, D.D., Bishop of *Natal*. The Defendants were:—The Right Hon. *W. E. Gladstone*, M.P.; the Vice-Chancellor Sir *W. P. Wood*; the Ven. *W. H. Hale*, Archdeacon of *London*; *J. G. Hubbard*; the Archbishop of *Canterbury*; the Archbishop of *York*; and Her Majesty's Attorney-General.

The circumstances under which the suit arose were as follows:—

In 1841, the then Archbishop of *Canterbury* issued the following invitation:—"The Archbishop of *Canterbury*, looking to the defective provisions hitherto made for planting the church in the distant dependencies of the British Empire, and desiring that an effort should be made to extend to them the full benefit of its apostolical government and discipline, invites the clergy and laity to attend a meeting on the 27th of April, 1841, for the purpose of commencing a fund for the endowment of additional bishoprics in the colonies."

A meeting of clergy and laity was held, on the 27th of April, 1841, pursuant to the above invitation, when the following resolutions were adopted:—

"1. That the Church of *England*, in endeavouring to discharge her unquestionable duty of providing for the religious wants of her members in foreign lands, is bound to proceed upon her own principles of apostolical order and discipline.

"2. That the want of episcopal superintendence is a great and acknowledged defect in the religious provision hitherto made for many of the colonies and dependencies of the British Crown.

"3. That the acquisition of new colonies, and the formation of British communities in various parts of the world, render it necessary that an immediate effort should be made to impart to them the full benefit of the church, in all the completeness of her ministry, ordinances, and government.

"4. That a fund be raised towards providing for the endowment of bishoprics in such of the foreign possessions of *Great*

(1) 1 Moo P. C. (N. S.) 411. (2) 3 Moo. P. C. (N. S.) 115.

Britain as shall be determined upon by the archbishops and bishops of the United Church of *England* and *Ireland:* that their lordships be requested to undertake the charge and application of the fund, and to name a treasurer or treasurers, and such other officers as may be required for conducting the necessary details."

Pursuant to the request contained in the 4th resolution, the following declaration was agreed to at a meeting of archbishops and bishops, held at *Lambeth Palace* on the 1st of June, 1841 :—

"We, the undersigned archbishops and bishops of the United Church of *England* and *Ireland*, contemplate, with deep concern, the insufficient provision which has been hitherto made for the spiritual care of the members of our national church residing in the British Colonies, and in distant parts of the world, especially as regards the want of a systematic superintendence of the clergy, and the observance of those ordinances, the administration of which is committed to the episcopal order. We therefore hold it to be our duty, in compliance with the resolutions of a meeting convened by the Archbishop of *Canterbury*, on the 27th of April last, to undertake the charge of the fund for the endowment of additional bishoprics in the colonies, and to become responsible for its application. On due consideration of the relative claims of those dependencies of the empire which require our assistance, we are of opinion that the immediate erection of bishoprics is much to be desired in the following places: *New Zealand*, the British possessions in the *Mediterranean*, *New Brunswick*, *Cape of Good Hope*, *Van Dieman's Land*, and *Ceylon*. . . . . In no case shall we proceed without the sanction of Her Majesty's Government." The declaration proceeded to nominate a standing committee, consisting of the Archbishops of *Canterbury*, *York*, *Armagh*, and *Dublin*, and five of the English bishops, with full powers to confer with the ministers of the Crown, and to arrange measures in concert with them for the erection of bishoprics in the places above enumerated."

Treasurers were then appointed, and an appeal made for funds to attain these objects. All the archbishops and bishops of the United Church of *England* and *Ireland* signed or expressed

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their concurrence in the above declaration, and were subsequently formed into a committee, called "The Council for Colonial Bishops."

Treasurers were from time to time appointed, and contributions received, partly on the general trusts expressed in the resolutions and declaration, and partly in trust for particular bishoprics founded on the same footing. Part of such moneys was invested in different colonies, for the use of the bishoprics therein established, and the residue was transferred to the treasurers for the time being, and was then vested in the first four Defendants, as the present treasurers, and formed in their hands a gross fund, called "*The Colonial Bishoprics' Fund.*"

The Council for Colonial Bishops from time to time conferred with the ministers of the Crown, and arranged measures in concert with them, for the erection of colonial bishoprics; and when it appeared that the erection of a bishopric in any colony would be expedient, and upon a suitable amount being fixed for the annual income of the bishop of such intended see, and the council agreeing that such income should be for ever appropriated out of the proceeds of the *Colonial Bishoprics' Fund*, letters-patent were granted by the Crown, erecting such bishopric, and appointing some clergyman to be ordained and consecrated bishop thereof.

By letters-patent under the Great Seal, dated the 25th of September, 1847, the colony of the *Cape of Good Hope*, with its dependencies, were constituted a bishop's see and diocese, under the title of the Bishopric of *Cape Town*, and the Rev. *R. Gray* was thereby appointed, and was subsequently consecrated bishop of such diocese.

In 1853 the Council for Colonial Bishops determined to provide funds for the erection of two new sees in *South Africa*, one at *Graham's Town*, and the other in the colony of *Natal*, besides two in other colonies; and on the 21st of June, 1853, they passed a resolution "that a communication be addressed to the Secretary of State for the Colonies, assuring him that the council had appropriated a capital sum of £10,000 for the endowment of a bishopric in *Natal*;" and on the 22nd of June, the secretary of the council addressed the following letter to the Duke of *Newcastle*, then Secretary of State for the Colonies:—

"79, *Pall Mall*, 22nd June, 1853.

"My Lord Duke,

"I am directed by the Council for Colonial Bishoprics to inform you that they have appropriated and are prepared to invest a capital sum of £10,000, for the endowment of the proposed bishopric in the colony of *Natal*, and I am further to express a hope that measures may be taken without delay for the erection of the see in question.

"I have, &c.,

"*Ernest Hawkins*."

"To his Grace the Duke of *Newcastle*."

In July, 1853, the *Society for the Propagation of the Gospel* suggested the propriety of increasing the endowment of these two bishoprics, which was done by a resolution of the council in these terms:—

"That it was the opinion of the Council that it was extremely desirable that some assistance should be granted from the general funds of the society towards increasing the income of the bishoprics of *Graham's Town* and *Natal*, during the first years of their episcopate, and that, therefore, it be referred to the standing committee to consider whether the sum of £300 a year might properly be granted to the new sees of *Graham's Town* and *Natal* for the term of five years."

On the 23rd of November, 1853, the letters-patent creating the see and diocese of *Natal*, a colony where an independent Legislature had been established, issued under the Great Seal. They were to this effect:—they recited the letters-patent creating the see or diocese of *Cape Town*, the resignation of Dr. *Gray*, the bishop, whereby the see or diocese had become vacant: they recited the expediency of dividing that see or diocese into three distinct sees, to be styled *Cape Town*, *Graham's Town*, and *Natal;* they then proceeded to constitute the district of *Natal* into a distinct and separate see and diocese, and commanded the Archbishop of *Canterbury* to ordain and consecrate the Plaintiff to be bishop of the said see and diocese. The letters-patent then proceeded in these words:—

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BISHOP OF NATAL v. GLADSTONE.

"And we do hereby signify to the Most Reverend Father in God, *John Bird*, by Divine providence Lord Archbishop of *Canterbury*, Primate of all *England*, and Metropolitan, the creation and constitution of the said see and diocese, and our nomination of the said *John William Colenso*, requiring, and by the faith and love whereby he is bound unto us, commanding, the said most reverend father in God to ordain and consecrate the said *John William Colenso* to be bishop of the said see and diocese in manner accustomed, and diligently to do and perform all other things appertaining to his office in this behalf with effect. And we do ordain and declare that the said *John William Colenso*, so by us nominated and appointed, after having been ordained and consecrated as aforesaid, may, by virtue of such appointment and consecration, enter into and possess the said bishop's see, as the bishop thereof, without let or impediment from us, our heirs and successors, for the term of his natural life, subject, nevertheless, to the right of resignation, hereinafter more fully expressed, saving nevertheless unto us, our heirs and successors, the power of altering from time to time, with the consent of the Archbishop of *Canterbury* for the time being, if the said see be vacant, or otherwise with the consent of the said archbishop and of the bishop of the said see for the time being, the limits of the said diocese or of the jurisdiction of the bishop thereof."

After this they constituted the Bishop of *Natal* a body corporate, and proceeded thus:—

"And we do further ordain and declare that the said Bishop of *Natal* and his successors shall be subject and subordinate to the see of *Cape Town*, and to the bishop thereof and his successors, in the same manner as any bishop of any see within the province of *Canterbury*, in our kingdom of *England*, is under the authority of the archiepiscopal see of that province and of the archbishop of the same. And we do hereby further will and ordain that the said *John William Colenso* and every Bishop of *Natal* shall, within six months after the date of their respective letters-patent, take an oath of due obedience to the Bishop of *Cape Town* for the time being as his metropolitan, which oath shall and may be ministered unto him by the said archbishop, or by any person by him duly

appointed or authorized for that purpose; and we do further by these presents expressly declare that the said Bishop of *Natal*, and also his successors, having been respectively by us, our heirs and successors, named and appointed, and by the said Archbishop of *Canterbury* canonically ordained and consecrated according to the form of the United Church of *England* and *Ireland*, may perform all the functions peculiar and appropriate to the office of bishop within the said diocese of *Natal*. And for a declaration of the spiritual causes or matters in which the aforesaid jurisdiction may be more especially exercised, we do by these presents further declare that the aforesaid Bishop of *Natal* and his successors may exercise and enjoy full power and authority, by himself or themselves, or by the archdeacon or archdeacons, or the vicar-general or other officer or officers hereinafter mentioned, to give institution to benefices, to grant licences to officiate to all rectors, curates, ministers, and chaplains of all the churches or chapels, or other places within the said diocese wherein divine service shall be celebrated according to the rites and liturgy of the Church of *England*, and to visit all rectors, curates, ministers, and chaplains, and all priests and deacons in holy orders of the United Church of *England* and *Ireland* resident within the said diocese, and also to call before him or them, or before the archdeacon or archdeacons, or the vicar-general or other officer or officers hereinafter mentioned, at such competent days, hours, and places when and so often as to him or them shall seem meet and convenient, the aforesaid rectors, curates, ministers, chaplains, priests and deacons, or any of them, and to inquire as well concerning their morals as their behaviour in their said office and stations respectively, subject nevertheless to such rights of review and appeal as are hereinafter given and reserved."

By virtue of the letters-patent, the Plaintiff was consecrated by the Archbishop of *Canterbury* on the 30th of November, 1853, and took an oath of canonical obedience to the Metropolitan Bishop of *Cape Town* in these words:—

"I do profess and promise all due reverence and obedience to the Metropolitan Bishop of *Cape Town*, and to his successors, and to the Metropolitan Church of *St. George, Cape Town*."

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On the 8th of December, 1853, letters-patent under the Great Seal were issued, which, after setting forth the letters-patent of the 25th of September, 1847, and reciting the same things as were therein recited, proceeded to constitute the western districts of the *Cape of Good Hope* a distinct see and diocese, to be called the Bishopric of *Cape Town*, and appointing the said *R. Gray* to be bishop of the see, subject to the general superintendence of the Archbishops of *Canterbury*, and ordained that the Bishops of *Graham's Town* and *Natal* should be suffragan bishops to the Bishop of *Cape Town* and his successors, and granted to the Bishop of *Cape Town* and his successors full power and authority to exercise metropolitan jurisdiction over the bishops of the said sees, with power to visit the said bishops, and all priests and deacons within the diocese, with all manner of visitorial power and coercion. They further gave leave that in case any proceedings should be instituted against the Bishops of *Graham's Town* and *Natal*, when placed under the metropolitan see of *Cape Town*, such proceedings should originate and be carried before the Bishop of *Cape Town*, who was thereby authorized and directed to take cognizance of the same.

From the time when the Plaintiff was consecrated, the sum of £362 10s., being the interest of the sum of £10,000 appropriated for the endowment of the Bishopric of *Natal*, and the sum of £300 additional, in pursuance of the resolution of the 26th of July, 1853, were paid annually to the Plaintiff, till the 5th of April, 1864.

In May, 1863, a charge was made against the Plaintiff of erroneous teaching and doctrine by the writing and publication of certain books within the province of *Cape Town*, and he was served with a citation to appear and answer such charge before the Bishop of *Cape Town*. The Plaintiff did not attend in person before the bishop, but one *Dr. Bleek* attended on his behalf, and protested against the exercise of any jurisdiction by the Bishop of *Cape Town* over the Plaintiff.

The Bishop of *Cape Town*, notwithstanding such protest, investigated the charges, and by a sentence or decree of the 16th of December, 1863, adjudged the Plaintiff to be deposed from the office of bishop. The bishop wrote to the secretary of the *Colonial Bishoprics' Fund*, informing them of the sentence, and requested

them to cease to pay the interest of any endowment which might belong to the Bishopric of *Natal.*

From the 10th of April, 1864, the interest and salary had not been paid to the Plaintiff, but carried to a separate account.

The Plaintiff presented a petition of appeal against the sentence of the Bishop of *Cape Town* to Her Majesty in Council, which was referred to the Judicial Committee. On the 20th of March, 1865, the Judicial Committee delivered their judgment, that the proceedings taken by the Bishop of *Cape Town* were void in law, which was approved by Her Majesty, and the sentence of deprivation was accordingly pronounced void: *In re Bishop of Natal* (1).

By that judgment it was decided that, as there was an independent legislative assembly in the colony, there was no power in the Crown by virtue of its prerogative (without the provisions of a statute of the Imperial Parliament) to establish a metropolitan see or province, or to create an ecclesiastical corporation, whose *status*, rights, and authority, the colony could be required to recognize; that even if the letters-patent did create between the metropolitan and suffragan bishop an ecclesiastical *status*, yet the Crown had no power to confer any jurisdiction or coercive legal authority upon the metropolitan over a suffragan bishop, or over any other person; and that the oath of canonical obedience taken by the suffragan bishop to his metropolitan, did not confer any jurisdiction on the metropolitan bishop by which a sentence of deprivation could be supported, nor was it legally competent to the parties to give or receive such a voluntary or consensual jurisdiction.

The Plaintiff applied to the first four Defendants for payment of the arrears of his annual income, but they declined, and he filed his bill against them as treasurers, and against the two archbishops as representing the archbishops and bishops who were trustees of the *Colonial Bishopries' Fund*, and the Attorney-General, praying that it might be declared that a sufficient part of the said fund had been irrevocably appropriated to the endowment for all time of the Bishop of *Natal* for the time being, and that the annual income of £662 10s. ought, out of the said fund, to be regularly paid to the bishop for the time being, and the arrears paid to the Plaintiff.

(1) 3 Moo. P. C. (N. S.) 115: *Upon Ch. S. 353.*

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The Defendants in their answer referred to the proceedings of the Synod of *Cape Town*, consisting of the Bishop of *Cape Town*, the Bishop of *Graham's Town*, and the Bishop of *Orange River*, held on the 15th of December, 1853, communicated to the Council for Colonial Bishops, wherein the synod expressed its approval of the sentence then about to be passed on the Plaintiff by the metropolitan. The Defendants also referred to an address to the Bishop of *Cape Town*, agreed upon at a meeting of the clergy of the diocese of *Natal*, stating that even if the Plaintiff should return to the colony with legal authority, they could not acknowledge him as having authority in spiritual matters.

The Defendants further stated as follows in the 39th paragraph of their answer:—

"We are advised that, in accordance with the judgment of the Judicial Committee of the Privy Council, the said letters-patent of the 23rd day of November, 1853, are to be considered null and void so far as they purport to create any diocese, or to confer any legal jurisdiction or authority on the Plaintiff, and that the Plaintiff has no power to exercise the functions of a bishop in the colony of *Natal*, or, at all events, has no jurisdiction as a bishop in that colony, and is not himself subject, as by the said letters-patent affecting to create the said bishopric he was intended to be made subject, to the jurisdiction of the Bishop of *Cape Town* as his metropolitan, or to any other spiritual or ecclesiastical jurisdiction whatsoever, and we submit that, if such is the case, then the objects set forth in the declaration referred to in the third paragraph of the said bill, and for which the funds hereinbefore mentioned were invested and subscribed, have not been obtained, which objects were in the first place to secure the pastoral care of a bishop for the clergy and people of the diocese of *Natal*, and in the second place to bring such bishop under the jurisdiction of a metropolitan as in the church at home, such metropolitan being himself subject to the authority of the Archbishop of *Canterbury*, and we declare our belief that none of the contributors to the *Colonial Bishoprics' Fund* intended to subscribe towards the support of a bishop such as the judgment of the said Judicial Committee of Her Majesty's Privy Council has decided the Plaintiff

to be—that is to say, a bishop without any jurisdiction over his clergy on the one hand, and entirely independent of all metropolitan jurisdiction on the other, and as evidence thereof we especially crave leave to refer to a letter addressed by Miss *Burdett Coutts* to the Defendant, the Archbishop of *Canterbury*, and received since this our answer was prepared."

The Defendants submitted that by reason of the failure of the letters-patent of the 23rd of November, 1853, to create any legal diocese, or to constitute a bishop with legal authority and jurisdiction, or to provide any means of correcting or depriving any such bishop in the event of a deviation by him from the principles of the doctrine and discipline of the United Church, and also having regard to the refusal of the clergy of *Natal* to recognise the Plaintiff as their bishop, or to submit to his superintendence, and to the impossibility of compelling them to do so, they were not justified, as trustees of the fund, in continuing to pay to the Plaintiff the stipend claimed by him as Bishop of *Natal*.

Mr. *W. M. James*, Q.C., for the Plaintiff:—

The question in this case does not depend upon whether the Plaintiff has or has not, by his published writings, offended against the ecclesiastical law of *England*, no case of that kind having been raised by the Defendants as a defence to the suit. The main question is, whether the letters-patent, under which the Plaintiff derives his authority as Bishop of *Natal*, have been virtually repealed.

The Defendants contend that the result of the judgments of the Judicial Committee in *Long* v. *Bishop of Cape Town* (1) and *In re Bishop of Natal* (2) shew that the letters-patent were invalid, and that he never was really Bishop of *Natal* at all. This is the case raised in their answer, without filing a cross bill, or taking any proceedings to set aside the letters-patent. In support of their case, they refer to the proceedings of the Synod at *Cape Town*, which are as invalid for the purpose of this suit as they were held to be by the Judicial Committee. The Defendants further refer to the supposed opinions of the subscribers to the *Colonial Bishoprics' Fund*, but there is nothing to shew that it was ever contemplated that the Crown could create Courts giving the

(1) 1 Moo. P. C. (N. S.) 411. 9 Jur. N. S. 805

(2) 3 Moo. P. C. (N. S.) 115. 11 Jur. N. S. 353.

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Plaintiff any coercive jurisdiction. Even if he has not all the power which some who subscribed to the endowment expected him to possess, does it, therefore, follow that he is not bishop of the diocese? The letters-patent were accepted by the Secretary of State for the Colonies, by the Council for Colonial Bishops, and by the Plaintiff, as sufficient, and, on the strength of their validity, his income was increased by a further grant of £300 a year.

The doctrine and discipline of the Church of *England* can be fully maintained in every colonial branch of that church; but there is this difference between the church established by law in this country, and that established by way of charitable gift in a colony, that, in this country, the parson is the parson of the whole parish, and the bishop is the bishop of all parsons and of all people in his diocese; whereas abroad a parson is only minister of those who choose to come in and acknowledge his ministry, and the bishop is only bishop of those who choose voluntarily to submit to his jurisdiction. Here, too, there are ecclesiastical Judges, nominated by the bishop and archbishop, who can proceed against any clergyman who offends against discipline or morals; abroad, there can be no such proceeding taken personally by the bishop, or by a Judge nominated by him, but before Judges nominated by the Crown, on proper cause being shewn. This is analogous to the jurisdiction exercised by our Courts with regard to dissenting bodies.

In the case of *Long* v. *Bishop of Cape Town* (1), which was an appeal from the Supreme Court in the *Cape* Colony, where the bishop had pronounced a sentence of deprivation against Mr. *Long*, the Judges in the Court below, though they considered the letters-patent were ineffectual to create any coercive jurisdiction, held that the defect was supplied by the voluntary submission of Mr. *Long* to the bishop. The Judicial Committee accepted the principles laid down in the Court below, though they considered that the offence was not one which, according to the laws of the Church of *England*, warranted the Appellant's deprivation. That decision, therefore, negatives the plea of the Defendants, that the bishop has not full jurisdiction over the clergy within the limits of his see.

(1) 1 Moo. P. C. (N. S.) 411: / Jur. N. S. 353.

and the Defendants that they would pay him a salary of £662 a year for life, so long as he was able and willing to perform the duties of a bishop in *Natal*, and held the Queen's letters-patent for that purpose. The Defendants, by their answer, maintain that the Plaintiff is not a bishop legally constituted. But what is a bishop legally constituted? He is a person lawfully constituted according to the Church of *England*, designated by the Queen, holding letters-patent, and ready and willing to discharge episcopal functions. To be a colonial bishop is to be a person having a *status* known to the law, and recognised in several Acts of Parliament, particularly 59 Geo. 3, c. 60; 15 & 16 Vict. c. 53; and 16 & 17 Vict. c. 49. In the case of *Reg.* v. *Eton College* (1), where a question arose as to the right of the Crown to appoint to a living vacated by the appointment of the incumbent to a colonial bishopric, the Court said (2), "We do not question the power of the Queen to create a bishopric in any part of her dominions except where, as in *Scotland*, such an exercise of prerogative is forbidden. In a newly settled colony, such an exercise of prerogative is lawful." Secondly: I contend that the Plaintiff is such a bishop. He has been consecrated; he holds the Queen's letters-patent, which have not been repealed; he is a corporation sole under the name of "Bishop of *Natal*;" the Defendants have recognised him as such, by paying him his salary for thirteen years. Thirdly: It follows that the Defendants ought to pay him the arrears now claimed by the bill. The reason alleged by the Defendants is this, that certain clauses in the letters-patent of the Bishop of *Cape Town*, who was subsequently created, have been held by the Judicial Committee of the Privy Council to be invalid; and as the result, that the bishop has not the coercive jurisdiction over the Plaintiff which a metropolitan bishop ought to possess over his suffragan. Whatever may be the effect of the judgment referred to on the patents of the Bishops of *Natal* and *Cape Town*, they must be taken to be valid till repealed by a writ of *scire facias*.

In the *Sackville College Case* (3), it was held that a grant might be good as to part and bad as to part. Even supposing that some

(1) 8 E. & B. 610: 4 Jur. N.S. 334 (2) 8 E. & B. 635: 4 Jur. N.S. 338
(3) Sir T. Raym. 177.

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of the clauses of the letters-patent affect to confer a jurisdiction which they cannot do, the Plaintiff's authority as Bishop of *Natal* is not thereby revoked. At any rate, the Defendants must be taken to have known what the letters-patent were, and that by the law the letters-patent could not confer the exercise of coercive jurisdiction; so that, assuming the invalidity of the letters-patent, they would not be absolved from their contract, nor can they avail themselves of the decision of the Synod of the Church of *South Africa*, or of the refusal of some of the clergy to obey the Plaintiff.

But the judgment of the Judicial Committee did not avoid the letters-patent. The proceeding of an appeal to Her Majesty in Council is a peculiar one. There are several cases in which the Crown has wished to be advised as to the exercise of its prerogative. In the cases of *In re Cape Breton* (1), and *In re The Justices of Bombay* (2), the Queen was advised as to the effect of her own letters-patent. The late judgment, so far from declaring the letters-patent to be void, shewed them to be good, *pro tanto*. It proceeded on the basis that the Queen has a personal jurisdiction over colonial bishops. The Plaintiff is a bishop legally constituted; he has conditions imposed on him by law, which may be ascertained by law, and enforced by law; he is a bishop personally subject to the Queen's jurisdiction, whom the clergy and members of the church in the colony may, if they like, make a centre of a voluntary ecclesiastical society. This they have done; and the royal supremacy exists there, only it is imported into the colony by contract between the parties.

Mr. *Westlake*, on the same side:—

The founders of this endowment did not, so far as is shewn, contemplate any exercise of coercive jurisdiction by the bishop. His quasi-judicial authority was only to extend to those who had accepted a quasi-contractual authority from him. Where the objects of a charity are not clearly stated, they must be judged of by the way in which they have been carried out.

Mr. *E. Charles*, on the same side:—

The Defendants having admitted that they are in the position

(1) 5 Moo. P. C. 259. (2) 1 Knapp, 1.

They further contend that it was part of the original scheme that the Bishop of *Cape Town* should be metropolitan, with power to deprive the Plaintiff of his functions: but there is no trace of such a suggestion in the steps which led to the creation of the Bishopric of *Natal*.

It is, no doubt, of the essence of every appointment made by the Crown to an office, that the officer should perform the duties of the office, and not violate the trust which is the implied condition of his appointment: *Com.* Dig. tit. "Officer" (1). The creation of this see was a plantation in the colony of *Natal* of the United Church of *England* and *Ireland*. It is of the essence of that church that the Sovereign is, under Our Lord, the supreme head and governor of the church, and has power to exercise all manner of ecclesiastical jurisdiction: *Com.* Dig. tit. "Prerogative" (2); also, the King has power to visit and reform all abuses in the church, and he may make visitation by special commissioners: *Com.* Dig. tit. "Visitor" (3). The church at *Natal* was established in acknowledgment of the royal supremacy. It follows that a person accepting the office of Bishop of *Natal* is subject to be visited by the Crown, in the same way as the archbishop, or the holder of a royal peculiar, like the Dean of *Westminster*, who is not subject to the archbishop as ordinary. As the Crown is the supreme ordinary, and can deprive any parson of his benefice, so would it have power, cause being shewn, to deprive the Plaintiff of his see.

Assuming the letters-patent not to be valid for the purpose of giving full powers to the Plaintiff, the Court cannot try that question incidentally in the present suit. In *Reg.* v. *Taylor* (4), the Court of Queen's Bench refused to grant a *quo warranto* information against the officer of a corporation established by charter, when it appeared that the object in prosecuting the information was to try the validity of the charter. The same principle was recognised in *Reg.* v. *Boucher* (5). So in *Robinson* v. *Governors of the London Hospital* (6), it was held that, where the charter of a corporation had been granted, with certain provisions, and was still unimpeached, though it might be open to the

(1) K. 2. (2) D. 9. (3) A. 1, 3. (4) 11 A. & E. 949.
(5) 3 Q. B. 641. (6) 10 Hare, 19.

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Attorney-General or the Crown to set it aside, the Court would deal with the corporation as having all the rights of an existing body. In *The Attorney-General* v. *Munro* (1), which was a suit to prevent the endowments of a church in communion with the Established Church of *Scotland* from being enjoyed by a minister of the Free Church, the Court refused to entertain an objection raised as to the validity of the trust deeds.

A charter, which is valid for all other purposes, may contain some provisions that are illegal, as in the cases of *East India Company* v. *Sandys* (2), and *The London Tobacco Pipe Makers Company*, v. *Woodroffe* (3). In the same manner, though it is not competent to the Crown, by these letters-patent, to bind all persons in the colony of *Natal*, yet the letters-patent can and do bind the Plaintiff, and all who choose to become members of the society constituting the Church of *England* in that colony.

It is one of the rules in construing letters-patent that they should be so construed as, if possible, to make them valid. "If two constructions can be made of the grant of the King, and by the one the grant shall be void and the other good, then for the honour of the King, and the benefit of the subject, such construction shall be made that the grant shall be good: *Vin.* Abr. tit. "Prerogative" (4). Applying the rule to these letters-patent, as the Crown has no power to create Courts giving the bishop coercive jurisdiction, they can only be construed as giving him jurisdiction over those who choose to come in and subject themselves to it. They have the same effect as regards members of the Anglican Church in *Natal* that a papal bull would have over members of the Roman Catholic Church in that colony.

The result is, that the Plaintiff is legally Bishop of *Natal*, which was practically decided by the judgment of the Judicial Committee in the Plaintiff's case; and no proceedings by the Synod at *Cape Town*, and no refusal of allegiance on the part of the clergy, can affect the Plaintiff's title, or his right to the endowment.

Mr. *Fitzjames Stephen*, on the same side:—

First: The pleadings disclose a contract between the Plaintiff

(1) 2 De G. & Sm. 122.
(2) 10 State Trials, 371; 1 Vern. 127.
(3) 7 B. & C. 838.
(4) O. c; (2nd ed. vol. x. p. 153.)

of trustees, the question is, whether the Plaintiff stands towards them in the relation of *cestui que trust*.

What were the trusts created in 1841, as shewn in the documents before the Court? They were trusts for the purpose of placing spiritual chief pastors over members of the Church of *England* in the colonies. Has that object been obtained in the present case? It is plain from the two cases before the Privy Council that both the Bishop of *Cape Town* and the Plaintiff hold the position of visitors in *foro domestico* over the clergy who have submitted themselves to their judgment. This was what the subscribers contemplated. Further, this trust was to provide for the spiritual superintendence of members of the Church of *England* in the colony who would, if the contention of the Defendants were to prevail, be deprived of the benefits intended to be conferred on them by the donors to the fund. The only points in which the letters-patent can be said to have failed is this, that, as regards the bishop, there is no metropolitan who can himself personally correct him in case of misconduct by his officer; that, as regards the clergy, there is no person who can, at the instance of the bishop, punish them for any misconduct, so that in both cases recourse must be had to the civil Courts. But such a question was never thought of when the endowment was founded. The Plaintiff is himself under visitation and power of correction, in the same way as, according to Lord *Coke* (1), the dean of a cathedral church of the patronage of the King might be deprived under proceedings before commissioners appointed by the King.

In the case of a colonial bishop, now, I submit that he might be tried by royal commissioners appointed by the Crown. He is not, therefore, as the Defendants contend, free from ecclesiastical jurisdiction, nor is he free from episcopal superintendence; nor can it be said that the clergy are free from the visitorial jurisdiction of the bishop, because that can be exercised, as in the Established Church of *Scotland*, the Free Church of *Scotland*, and in the Episcopal Churches of *America*, by just judgments pronounced in domestic tribunals of their own choice. The general intention of the donors cannot be defeated by the fact of a few paragraphs in the letters-patent being, as is alleged, in excess of the royal prerogative.

(1) Rep. Part xiii. Case 36.

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Supposing the Defendants to succeed, what is to become of the fund? It cannot revert to the donors, for there can be no reverter in charitable donations. If a scheme were to be directed to carry their intention into effect, none could be devised which would do it more effectually than that which now exists. The Plaintiff, therefore, is entitled to a decree.

Mr. *Wickens*, for the Attorney-General, claimed the benefit of the Plaintiff's arguments in support of the validity of the letters patent.

The *Attorney-General* (Sir *Roundell Palmer*), for the Defendants:—

I appear for the Defendants in this case in my private capacity as counsel.

LORD ROMILLY, M.R.:—The same thing happened in the case of Lady *Hewley's* charities, *Shore* v. *Wilson* (1), when the Attorney-General opposed the information.

The *Attorney-General*:—The Plaintiff's case does not rest on any footing of personal contract. He contends that there has been an irrevocable appropriation of a fund for the erection of a perpetual bishopric of *Natal*. But it is assumed that the whole appropriation was accepted by the government, and that they did all that was necessary to render the trust perfect. It is clear that nothing was intended but the creation of a legal see, such as is incident to a church established by law. The reference in the early correspondence to the bishoprics in the *East* and *West Indies*, shews the kind of episcopate that was intended, namely, one with all the benefits of the discipline and jurisdiction of the established church of this country. For this object the funds were subscribed: anything else would be *ultrà vires*. This, we submit, has not been done. It cannot be contended that the same objection would apply to all other colonial bishoprics, or to those colonies which were Crown colonies at the date of these transactions, such as *Malta* and *Ceylon*. Of these it was said in the judgment of the Judicial Committee in the

(1) 9 Cl. & F. 355.

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Plaintiff's case (1): "We, therefore, arrive at the conclusion, that though in a Crown colony, properly so called, or in cases where the letters-patent are made in pursuance of the authority of an Act of Parliament, such, for example, as the Act of 6 & 7 Vict. c. 13, a bishopric may be constituted, and ecclesiastical authority conferred by the sole authority of the Crown, yet that the letters-patent of the Crown will not have such effect or operation in a colony or settlement which is possessed of an independent Legislature." The cases are numerous where, as in *Jamaica*, the Colonial Legislature has sanctioned the creation of the see; and the Imperial Legislature has recognized the bishoprics of *New Zealand*, of *Victoria*, and those founded in *Canada: Burn's* Ecclesiastical Law (2). Again, the 5 Vict. c. 6 (the *Jerusalem Bishopric Act*), gave the bishop jurisdiction over English clergymen, not within the jurisdiction of the Crown, apart from their consent. It is contended that in this case no coercive jurisdiction was contemplated; but that was not the case, for the object was to give the whole discipline of the church to the colony, not a part of it; to secure a connection between the church in the colony and that at home, not to form a voluntary association founded on the consent of its members.

This object cannot be carried out without an ecclesiastical Court analogous to the ecclesiastical Courts at home. If the colonial churches stand on the footing on which by the recent decisions they have been held to stand, all questions of doctrine must be determined by the law Courts. This cannot be supposed to have been the intention of those who founded these sees.

Besides, the letters-patent which conferred on the Bishop of *Cape Town* the see of *Natal*, are still unrevoked by any local Act or Acts of Parliament, and his resignation did not extinguish his bishopric. The letters-patent of 1853 assume to sub-divide the diocese, and to create a new diocese of *Natal*. This could not be effected by letters-patent. The result of the judgment of the Judicial Committee is, that the Plaintiff is only titular bishop, with no see or diocese of *Natal*—none such having been created—and if so, as the endowment was appropriated for the see or bishopric of *Natal*, and none such exists, he cannot claim his salary.

A mere titular bishop is nothing, unless his diocese is recog-

(1) 3 Moo. P. C. (N.S.) 151. (2) 9th ed. vol. i. p. 415, *ffff*.

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nised by law. Thus, the dioceses of the bishops of the Episcopal Church in *Scotland*, and those of the Romish hierarchy in *England*, have never been recognised by law. The words "diocese" and "see" are terms of ecclesiastical law, and the law knows no application of them except with reference to territorial jurisdiction. Here we have no established church, no legal diocese, no ecclesiastical law.

The Defendants believed that the object of this endowment would be accomplished by the letters-patent: they now find from a superior authority that they have no effect except as regards voluntary associations. The effect of the judgments both in *Long* v. *Bishop of Cape Town* (1), and *In re Bishop of Natal* (2), was this, that the letters-patent were, for all purposes, nugatory and useless. The judgment in the last case goes further, for though the Plaintiff had taken an oath of canonical obedience to the metropolitan, it decided that the Bishop of *Cape Town* did not thereby obtain any jurisdiction over him. The Plaintiff's counsel say, that though there is no means of enforcing jurisdiction under the letters-patent, yet if any question of doctrine arises the Court can interfere, just as in voluntary associations this Court has jurisdiction such as has been exercised in *Attorney-General* v. *Gould* (3), and *Shore* v. *Wilson* (4). But these cases have no application to a case where coercive jurisdiction was essential to the scheme.

Then it is said that the Queen, as supreme ordinary, would have the power of visiting by commission, and, if necessary, of deposing a bishop thus constituted. The doctrine of the royal supremacy is, that the Queen is over all persons, over all causes, and in all her dominions supreme, and the only reason why that supremacy is assumed in ecclesiastical matters is, that she has ecclesiastical Courts and ecclesiastical laws; but it is not to be supposed that where there is no established church the supremacy does not extend, for she is still supreme over all persons. But the words "Head of the Church," only refer to places where there is an established church, and nowhere else: *Caudrey's Case* (5). This is clear from the statutes 25 Hen. 8, c. 19, 16 Car. 1, c. 11, and 13 Car. 2, c. 12.

(1) 1 Moo. P. C. (N. S.) 411: 9 Jur. N.S. 805
(2) 3 Moo. P. C. (N. S.) 115: 8 Jur. N.S. 353
(3) 28 Beav. 485. 7 Jur. N.S. 84.
(4) 9 Cl. & F. 355.
(5) Co. Rep. pt. 5, 1*a*.

The Crown has never exercised such a power as that of deprivation, except by way of confirming a sentence pronounced by a metropolitan. In the case of the non-juring bishops it was done by Act of Parliament.

Then it was said that all parties had accepted the letters-patent, and that it was not open to the trustees to question the title of their *cestui que trust*. The answer is, that no trust on the footing of the letters-patent was ever executed.

Then it was urged that the validity of letters-patent could not be tried incidentally in this suit; but this is not a question as to the validity of the letters-patent, but as to the effect of two decisions which have pronounced them invalid. The proceedings of the synod and of the clergy of the colony are referred to for the purpose of shewing that not only has the appointment of the Plaintiff failed in law, but it has no practical effect as regards the clergy under him.

Mr. *Selwyn*, Q.C., on the same side:—

The letters-patent refer expressly to three things: first, the locality or sphere of action of the proposed bishopric; secondly, that the person to be appointed should have full jurisdiction over all members of the Church of *England* in that district; and, thirdly, that he should discharge his duties according to the discipline of the Church of *England*.

The functions of a bishop, and the nature of a see or diocese, are thus defined by *Hooker* (1): "The church, when the bishop is set with his college of presbyters about him, we call a *see;* the local compass of his authority we term a *diocese*. Unto a bishop, within the compass of his own, both see and diocese, it hath by right of his place evermore appertained to ordain presbyters, to make deacons, and with judgment to dispose of all things of weight." This strikes at the root of the proposition that the Plaintiff can sustain the office of bishop of a diocese when he only has jurisdiction over those who submit to him by voluntary compact. The jurisdiction of a metropolitan or chief bishop over the other bishops has always been a recognised part of episcopal government: *Hooker*, Ecc. Pol. (2). When the conduct of a bishop

(1) Book vii. chap. 8, par. 3. (2) Book vii. chap. viii. par. 5.

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is called in question, the proper course is for the metropolitan to call in the aid of others to assist him, thus constituting a "synod:" *Bede* Hist. Ecc. (1). This was the case in very ancient times. It cannot be assumed that there was any intention to found an independent church in *Natal* when the persons to administer the fund were the archbishops and bishops of the Church of *England*.

The church intended to be founded was "the church" with its apostolical government and discipline.

[LORD ROMILLY, M.R.:—In apostolical times the first bishops were merely heads of a voluntary association.]

The intention was to found such an institution as that every person within its local compass should be either subject to its discipline or a seceder from it, whereas it now appears that the Plaintiff has no power at all. If a member of the *Inns of Court Volunteer Corps* refused to obey the colonel, and said he would obey the colonel of some other regiment, he could not do so. But in *Natal* every person is just as much bound to obey the Bishop of *Melanesia* as the Bishop of *Natal*. The intention was to have a bishop subordinate to the Bishop of *Cape Town*. This has wholly failed, and the essential qualifications of a bishop, as contemplated by the founders of the endowment, are wholly wanting.

Mr. *Pemberton*, on the same side.

Mr. *W. M. James*, in reply:—

I have to maintain, against the bishops and archbishops, that the church may be extended to the colonies without coercive jurisdiction; against the first law officer of the Crown, the rights of the Crown as to patronage; and against the trustees of this fund, that they have not been guilty of a breach of trust. The endowment contemplated a bishopric *in Natal*. The district within which the Plaintiff was empowered to exercise his episcopal functions was defined by the letters-patent. It was not a diocese *over* which he was to exercise jurisdiction, but one *within* the limits of which he was to exercise certain offices. The subscribers must be taken to have known that he would be such a bishop as the Judicial Com-

(1) Ed. 1838, chap. xxix. s. 72.

mittee have declared a colonial bishop to be. He was to be a missionary bishop, such as *Augustine* was when he came to found the church in this country. In the case of *In re Bishop of Natal* (1) the validity of the letters-patent of the Plaintiff did not come in question, except so far as they gave him a status by which he appeared there.

As regards the requisites for a bishop, which the Defendants say are wanting, he has a local compass, which is given him by the letters-patent in the district assigned to him for a diocese: he has jurisdiction over the clergy, over all those who put themselves in communion with the Church of *England*, in the same way as a Roman Catholic bishop in this country has over all the priests of his church, over whom he has the oversight. As regards his subordination, it is said that every bishop must be subject to a superior. But every person holding office under the Crown holds it *quam diu se bene gesserit*. The Bishop of *Natal* cannot refuse the right of visitation, which is incident to every ecclesiastical and charitable foundation in *England*, and can be exercised by the Crown when no other visitor is appointed.

Nov. 6. LORD ROMILLY, M.R.:—

This is a suit instituted by *John William Colenso*, claiming to be Bishop of *Natal*, against the trustees of the *Colonial Bishoprics' Fund*, praying that the annual income of the fund appropriated for the endowment of the bishopric of *Natal* may be paid to him. The Defendants do not deny that the Plaintiff is in some sense Bishop of *Natal*: the defence is, in substance, that no legal diocese of *Natal* has been created, that the title of Bishop of *Natal* conferred on the Plaintiff is little more than nominal, that the funds entrusted to the Defendants were subscribed for the endowment of a bishopric in *Natal*, in which the bishop was to preside over an Episcopal Church identical with the United Church of *England* and *Ireland*, and where the bishop had legal jurisdiction according to the principles of the English ecclesiastical law. They contend that this object has wholly failed, for that by recent decisions of

(1) 3 Moo. P. C. (N.S.) 115: // Jur N.S. 353.

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the Privy Council it has been established that the person on whom has been conferred the title of Bishop of *Natal* can exercise none of these functions. Such is a short outline of the defence pleaded by the Defendants.

It will be necessary for me, in order to arrive at a satisfactory determination in this case, to consider, in the first place, what the duties and functions of a bishop of the Church of *England* are:

In the second place, to what extent the letters-patent of the Crown have failed in enabling the Plaintiff to perform these duties and to exercise these functions within the colony of *Natal*, having regard to the law as declared by the decisions of the Privy Council in the case of *Long* v. *Bishop of Cape Town* (1), and in the case of the Petition of the Bishop of *Natal* against the sentence of the Bishop of *Cape Town*, which was referred by Her Majesty to the Judicial Committee of the Privy Council (2); and to arrive at a satisfactory conclusion on the subject, it will be necessary to examine what is the real position of these churches in the colonial dependencies on the Crown of *England*.

In the third place, it will be necessary to ascertain the objects for which the funds in the hands of the Defendants were contributed, the nature and extent of the contract entered into by the contributors of these funds with the Crown and with the Plaintiff when he was appointed Bishop of *Natal*, and whether, having regard to these matters, or any of them, the Defendants are bound to withold from the Plaintiff, or to pay to him, the funds entrusted to their administration.

The facts which raise these questions are very few and not in dispute. They are as follows:—

In 1841, the Archbishop of *Canterbury* issued an invitation to the clergy and laity to attend a meeting, in April of that year, for the purpose of commencing the creation of a fund for the endowment of additional bishops for the colonies. On the 27th of April the meeting was held, and four resolutions were passed, the fourth of which was in these terms:—

"That a fund be raised towards providing for the endowment of bishopries in such of the foreign possessions of *Great Britain* as

(1) 1 Moo. P. C. (N. S.) 411. 9 Jur. N. S. 805

(2) 3 Moo. P. C. (N. S.) 115. 11 Jur. N. S. 353.

shall be determined upon by the archbishops and bishops of the United Church of *England* and *Ireland*. That their lordships be requested to undertake the charge and application of the fund, and to name a treasurer or treasurers, and such other officers as may be required for conducting the necessary details."

On the Tuesday in Whitsun week following, the prelates met, according to the request so expressed, and undertook to take charge of the fund; they pointed out the dependencies on the Crown where bishoprics were the more immediately required; they appointed a standing committee, consisting of the four archbishops and five bishops, to conduct the matter; and they concluded with stating that in no case should they proceed without the concurrence of Her Majesty's Government.

Some years after this, on the 18th of May, 1849, the standing committee passed a resolution by which it was declared that thenceforward all the archbishops and bishops of the United Church of *England* and *Ireland* should form the committee, which was thenceforth to be called the Council for Colonial Bishoprics. Treasurers were appointed for the administration of the fund to be raised for these purposes. The four first Defendants on the record are the treasurers to whom this administration is now confided.

The mode in which new bishoprics were created from time to time, as they were considered to be required, was as follows:—As soon as this committee, or Council for Colonial Bishoprics, came to the conclusion that it would be expedient to found a bishopric in any particular colony, and had ascertained that they possessed funds sufficient, in their opinion, for the due maintenance of the bishop of such intended diocese, they communicated with Her Majesty's Government on the subject, whose assent being obtained, thereupon the committee, or the council, entered into an agreement with the Crown, through Her Majesty's ministers, that a certain annual income then specified should be appropriated out of the proceeds of the *Colonial Bishopric Fund* for the use of such bishop. Her Majesty thereupon granted her letters-patent, purporting to create the diocese required, and then appointed some priest to be ordained and consecrated as the bishop of such colonial diocese.

It was in this manner that the colony of the *Cape of Good Hope*

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and its dependencies were, in September, 1847, constituted a bishop's see and diocese.

Early in March, 1853, the Council for Colonial Bishoprics resolved to obtain the creation of four new bishoprics, one of which was to include the eastern province of the *Cape* Colony, and to be termed the bishopric of *Graham's Town*, and another was to include the province of *Natal*. Accordingly, for this purpose, on the 22nd of June, 1853, Mr. *Hawkins*, the secretary of the council, addressed a letter to the Secretary of State for the Colonies in the following terms:—

[His Lordship then read the letter, and stated the resolution of the council for increasing the endowment of the two bishoprics of *Natal* and *Graham's Town* by £300 a year, and the effect of the letters-patent of the 23rd of November, 1853, as before stated.]

From the period when this took place, the sum of £362 10*s*., being the interest of the £10,000, reduced to that amount by the payment of two sums out of the *Colonial Bishoprics' Fund*, for the use of the Bishop of *Natal*, and the sum of £300 additional, in pursuance of the resolution of the 26th of July, 1852, making together the sum of £662 10*s*., have been regularly paid to the Plaintiff up to, and including, the 5th of April, 1864. Since that time this sum has been carried to a separate account.

In May, 1863, a charge was made against the Plaintiff that he had been guilty of false and erroneous teaching and doctrine, by the publication of certain books, within the province of *Cape Town*, and the Plaintiff was cited to appear and answer the charge before the Bishop of *Cape Town*, on the 17th of November, 1863.

The Plaintiff, by his agent, Dr. *Bleek*, protested against the exercise of any jurisdiction over him by the Bishop of *Cape Town*, who, nevertheless, as his metropolitan, investigated the charges against the Plaintiff, and pronounced a sentence of deprivation against him on the 16th of December, 1863.

On the 15th of April, 1864, the Bishop of *Cape Town* wrote to the secretary of the Council of Colonial Bishoprics, communicating the sentence he had pronounced, and requesting that they would cease to pay the interest of any endowment to the bishop.

The Plaintiff presented a Petition of complaint and appeal to

Her Majesty, against the proceedings and sentence of the Bishop of *Cape Town*. Her Majesty referred the matter to the Judicial Committee of the Privy Council, who, after hearing counsel for the Plaintiff and for the Bishop of *Cape Town*, made their report on the 20th of March, 1865, in which they reported their opinion to be, that the sentence pronounced by the Bishop of *Cape Town* was null and void. On this judgment being given, the Plaintiff applied to the Defendants, the trustees, for payment to him of the stipend appropriated to the Bishop of *Natal* as theretofore. This the Defendants have declined to do. They have also declined to pay the Bishop of *Cape Town* his salary, and their reason for so doing is expressed in the 39th paragraph of their answer, which, as it sets forth the ground of their defence very clearly and distinctly, I think it proper to read.

[His Lordship then read the 39th paragraph of the answer before stated.]

These are all the facts which I think are necessary to be referred to in order to explain the character of the questions which are raised, and which I have to determine.

Before proceeding to consider the propositions which, in my opinion, must be decided, in order to arrive at the ultimate conclusion whether the Plaintiff is or is not entitled to the relief he asks, it will be convenient that I should state the questions which, in my opinion, I have not to consider; and, first of all, I have not to consider whether the Plaintiff, by false and erroneous teaching or doctrine, or in other manner, has misconducted himself as a bishop. I have nothing to do with the question whether his works have or have not an heretical tendency. That question might have been raised, and might have had an important bearing on the question whether the Plaintiff is or is not entitled to be paid the salary in question; but that question not only is not raised, but it seems to have been on both sides carefully excluded from the pleadings. I must, therefore, in dealing with the questions in this case, proceed on the assumption that neither in respect of morals nor in respect of doctrine is there anything to disqualify the Plaintiff from acting as Bishop of *Natal*.

In the second place, I have not to consider whether the letters-patent, creating the diocese of *Natal*, and appointing the Plain-

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tiff the bishop thereof, are, or not, wholly null and void. That question may be tried before some other tribunal, or in some other cause, in which their validity may be challenged, but it cannot be tried in this suit as at present constituted.

What I have now to consider is, the force and effect of these letters-patent as between the trustees, who obtained the grant, the Plaintiff, to whom it was made, and the members of the Church of *England*, in the colony of *Natal*, who have accepted, or submitted to it; and, in doing so, I have to consider whether, with reference to the law of *England* on this subject, as expounded by the Judicial Committee of the Privy Council, these letters-patent do not attempt to confer powers which the Crown has no legal power or authority to confer;—whether it is true, adopting the words of Dr. *Gray*, the Bishop of *Cape Town*, used by him in February, 1851, in one of the documents in evidence in this cause, that whatever may be their general validity, so far as their practical efficacy is concerned, "they are worth little more than waste paper." This distinction is one of importance, and must be borne constantly in mind in this case: the letters-patent of the Crown may be generally valid, and yet be ineffectual to confer any privilege. The Sovereign may grant letters-patent, creating a new bishopric in those places where it is not forbidden by statute—as, for instance, in one of the dependencies attached to the Crown, but the person appointed bishop may be prevented by law from performing any of the functions proper to be performed by a bishop. I must, therefore, examine every part of these letters-patent, in order to ascertain to what, if any, extent they confer powers or rights which cannot legally and validly be exercised or enforced. In other words, the letters-patent creating the see or diocese of *Natal*, and appointing the Plaintiff the bishop thereof, may validly make him a bishop, and confer upon him certain powers which he may legally exercise, and yet, at the same time, may also purport to give him other powers which he cannot legally exercise. If, however, this should turn out to be the fact, the circumstance that such excess of power is attempted to be conferred in and by the letters-patent does not render them wholly invalid, or vitiate that portion of them which confers powers which may be legally exercised.

The purport and effect of these letters-patent I have already stated in detail: in order to determine their legal efficacy, it is necessary to notice what it is they have effected, and how far this falls short of what they have attempted to effect. They have appointed the Plaintiff Bishop of *Natal;* they have commanded the Archbishop of *Canterbury* to consecrate the Plaintiff such bishop; the Archbishop of *Canterbury* has accordingly done so. The first question is, what is the effect of this? It is not disputed, and, indeed, it could not be disputed, that the nomination, by the Crown, of the Plaintiff, and his consecration by the Archbishop of *Canterbury*, have conferred upon him the title and dignity of a bishop of the Church of *England*, and also that he is thereby invested with all the powers and authority incidental to the office of bishop, so far as such powers and authority can be exercised without coercive legal jurisdiction over his clergy.

In all the works that I have consulted on this subject, the powers and authority of a bishop are classed under three heads:— 1. *Ordo;* 2. *Jurisdictio;* 3. *Administratio rei familiaris.* The letters-patent of the Crown profess to give the two first of these powers: they do not profess to give the third.

The first, which is the power of orders, he derives from consecration, which, according to the doctrine of the Catholic Church of *Christ*, of which the Church of *England* is a branch, is a sacred authority, derived by direct descent from the apostles. By this power, so conferred upon him, he may transmit the spiritual power he possesses to others; he can ordain deacons and priests; he can consecrate and dedicate churches; he can administer confirmation. This is the first and most important class of powers which a bishop possesses. These powers are not confined to this or that spot, but are universal. They extend over the whole world.

But this, it is alleged, makes him only a titular bishop, and not a territorial bishop, for that by this he has no see or diocese attached to his office. In order to appreciate the force and value of this remark, it is desirable to ascertain the origin of the distinction between a titular and a territorial bishop; and here I may observe, to avoid misconstruction, that in the letters-patent and in the judgments delivered in the Privy Council, the words "see" and "diocese" seem to be employed as equivalent expressions,

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although probably the word "see" has strictly a more confined meaning than the word "diocese." The primary reason why a diocese, or, in other words, a limited territorial space, was originally assigned to a bishop, was not, as I apprehend, because his functions or duties were confined to that space, but because, as the superintendence of the bishop was found to be more effectual when exercised principally over a limited extent, a territorial district, termed a diocese, was assigned to him as the limits within which he should principally exercise his authority. Thus it is that *England* has been parcelled out into particular special dioceses, not that each bishop could not exercise his authority universally, but because it was justly considered to be more beneficial to the cause of religion and morality that his superintendence and labours should be principally confined to a separate district, and that he should not actively interfere with those members of the church who were not within its limits. The bishops of the English Church have equal and universal powers in this respect, but the ordination of deacons and priests, the consecration and dedication of churches, and the confirmation of young persons, is (unless in exceptional cases) confined to the bishop of the diocese within which the exercise of the episcopal function is locally required.

Thus it is that titular bishops have become territorial bishops, not because there was, or is really, when unconnected with the state, any distinction between the two, but because it was found conducive to the good of the Catholic Church (using that word as I do throughout in its proper comprehensive classical meaning), that the duties of the bishop should be limited practically to such a space as he could usefully superintend.

In addition to the power of orders above mentioned, the letters-patent purported to confer on the Bishop of *Natal* and his successors the episcopal power *jurisdictionis*—that is, the power and authority over all rectors, curates, ministers, chaplains, priests, and deacons, within the diocese of *Natal;* and the letters-patent direct that if any person should conceive himself aggrieved by any judgment, decree, or sentence, pronounced by the Bishop of *Natal* or his successors, he shall have an appeal to the Bishop of *Cape Town*, who should finally decide and determine the appeal. Beyond this, in the letters-patent constituting the see of *Cape*

Town, a like right of appeal is professed to be given from the decision of the Bishop of *Cape Town* to the Archbishop of *Canterbury*, who is finally to decide and determine the appeal. It is on this passage in the letters-patent that the question has arisen. The Judicial Committee of the Privy Council have determined in the two cases—viz. *Long* v. *Bishop of Cape Town* (1), and *In re Bishop of Natal* (2), that, "although in a Crown colony, properly so called, or in cases where the letters-patent are made in pursuance of an Act of Parliament, a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the letters-patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent Legislature."

In 1845 an independent Legislature was created in the colony of *Cape Town*, and, accordingly, the authority professed to be exercised by the Bishop of *Cape Town* over Mr. *Long*, and also over the Bishop of *Natal*, was declared to be of no avail, and the sentences of deprivation were declared to be merely null and void. In 1847, an independent Legislature was created in the colony of *Natal*, and, consequently, by the decision of the Judicial Committee, no coercive jurisdiction, such as that professed to be given by the letters-patent to the Bishop of *Natal*, can, it is said, legally be exercised by him.

Assuming this to be so, the question I have, therefore, to consider is, how far this declaration of the law affects the *status* and position of the Plaintiff as a Bishop of *Natal*. I use the word *Natal* purposely, because it is obvious that it does not in the slightest degree affect his *status* and position as bishop of the Church of *England* generally, not being the bishop of any territorial see or diocese—it does not, therefore, in the least degree affect the first class of his powers—namely, that of orders; he can as lawfully and as conclusively ordain, confirm, and consecrate, as if the coercive jurisdiction could have been exercised by him. But then I come to inquire what are the other functions conferred upon him by the letters-patent which he cannot exercise? The words of the letters-patent on this subject are as follows:—

"And we do further, by these presents, expressly declare that

(1) 1 Moo. P. C. (N. S.) 411. (2) 1 Moo. P. C. (N. S.) 115, 151.

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the said Bishop of *Natal*, and also his successors, having been respectively, by us, our heirs and successors, named and appointed, and, by the said Archbishop of *Canterbury*, canonically ordained and consecrated, according to the form of the United Church of *England* and *Ireland*, may perform all the functions peculiar and appropriate to the office of bishop within the said diocese of *Natal*. And for a declaration of the spiritual causes and matters in which the aforesaid jurisdiction may be more specially exercised, we do, by these presents, further declare that the aforesaid Bishop of *Natal*, and his successors, may exercise and enjoy full power and authority, by himself or themselves, or by the archdeacon or archdeacons, or the vicar-general, or other officer or officers hereinafter mentioned, to give institution to benefices, to grant licenses to officiate to all rectors, curates, ministers, and chaplains, of all the churches or chapels, or other places within the said diocese wherein divine service shall be celebrated according to the rites and liturgy of the Church of *England*, and to visit all rectors, curates, ministers, and chaplains, and all priests and deacons in holy orders of the United Church of *England* and *Ireland*, resident within the said diocese, and also to call before him or them, or before the archdeacon or archdeacons, or the vicar-general, or other officer or officers hereinafter mentioned, at such competent days, hours, and places, when, and so often, as to him or them shall seem meet and convenient, the aforesaid rectors, curates, ministers, chaplains, priests, and deacons, or any of them, and to inquire as well concerning their morals as their behaviour in their said offices and stations respectively, subject, nevertheless, to such rights of review and appeal as are hereinafter given and reserved. And for the better accomplishment of the purposes aforesaid, we do hereby grant and declare that the said Bishop of *Natal* and his successors may found and constitute one or more dignities in his cathedral church, and also one or more archdeaconries within the said diocese; and may collate fit and proper persons to be dignitaries of the said cathedral church, and one or more fit and proper persons to be archdeacons of the said archdeaconries respectively: Provided always that such dignitaries and archdeacons shall exercise such jurisdiction only as shall be committed to them by the said bishop, or his successors; and the said bishop, and his successors, may also, from time to

time, nominate and appoint fit and proper persons to be respectively the officers hereinafter mentioned—that is to say, to be vicar-general, official principal, chancellor, or rural deans, and commissaries, either general or special; and may also appoint one or more fit and proper persons to be registrars and actuaries: Provided always, that the dignitaries and archdeacons aforesaid shall be subject and subordinate to the said Bishop of *Natal* and his successors, and shall be assisting to him and them in the exercise of his and their episcopal jurisdiction and functions."

I have failed to discover any of the functions or powers so enumerated which the Bishop of *Natal* is unable to exercise. No judgment of the Privy Council has deprived him of one of them. The law as declared by the Privy Council's Judicial Committee leaves all these functions to the bishop exactly as by the law of the Church of *England* they belong to that office. He may as bishop visit; he may as bishop call before him the ministers within his diocese; and he may inquire respecting their morals and behaviour, and the doctrines that they preach; but the power which the letters-patent seem to intimate an intention of conferring upon the bishop—namely, the power of enforcing obedience to his orders in the performance of these duties, and the power of removing any obstruction which may be interposed to prevent his performing any of the functions of a bishop—this power is not given to him personally, or to any officers of his, or dependent on him. Is he therefore left powerless, and can any one with impunity resist his authority? This is not so; but to enforce obedience to his orders, or to remove obstructions interposed to prevent his performing his functions, he must have recourse to the civil tribunals which administer the law of the colony, before which tribunals the person who resists the acts of the bishop may contest the validity or legality of the acts intended to be done by the bishop, or of the orders given him.

In other words, the Bishop of *Natal* can exercise all the duties and functions, and perform all the acts, which belong to a bishop within the diocese of *Natal*, that he could if he were the bishop of an English diocese, with this exception, that he cannot enforce the execution of these orders without having recourse to the civil tribunals for that purpose. The letters-patent, therefore, are inope-

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rative in that respect; they are also inoperative in this further matter, that they purport to give an appeal to the Bishop of *Cape Town*, and they also purport to give an appeal from the Bishop of *Cape Town* to the Archbishop of *Canterbury*, to whom no such appeal by law can lie, so as to enable the Bishop of *Cape Town* or the Archbishop of *Canterbury* to enforce the coercive jurisdiction in these matters which the Bishop of *Natal* was unable to exercise. It is not that there is no appeal in such matters; but the appeal, such as it is, the extent of which I shall presently point out, lies to the civil tribunal, and from the civil tribunal in the colony to the Sovereign herself in Council, who, with the assistance of her councillors, will determine the question between the parties.

The more I have considered this question, which I have done very carefully, the more I have found myself at a loss to understand why, the duties and functions of the bishop remaining in every respect the same, the fact that in order to enforce obedience to his orders, and to remove obstructions interposed to impede his action, he must have recourse to the secular arm instead of enforcing it by his own power—that is, by officers of his own court—in any degree affects his *status* or position as a bishop. He is a titular bishop all the world over; he is a territorial bishop within his see or diocese of *Natal;* and with the assistance of the secular tribunals he can perform all the acts and duties which belong to the office of a bishop according to the doctrine of the Church of *England*. It is clear that this was all that was included in the word bishop from the earliest institution of that office down to the time when, the Christian religion having become the religion of the state, coercive jurisdiction was conferred on the prelates of the Christian church.

It is, in my opinion, impossible correctly to assert that this necessity of resorting to the civil tribunal, instead of enforcing obedience by the jurisdiction of the church itself, can annihilate a see or make it cease to be a legal diocese. On the contrary, I believe that when a careful inquiry is made into what the difference is that lies between them, it will be found that the law, as pronounced by the Judicial Committee, is likely to afford greater stability and unity to the Church of *England* in her colonial dependencies than if the law had been as contended for by the

Bishop of *Cape Town*. In the one case, if the letters-patent effected all that they were originally supposed to effect, the law on the subject would be declared by one prelate of the Church of *England*, with an appeal to another prelate, and possibly finally to the *Primate of all England*, where the matter would end. In the other case, the law would be declared by a civil tribunal with an appeal to the Sovereign in Council, where also the matter would end The law, it is important to observe, is and must be the same in both cases, and ought to be similarly administered, and that law is the law of the doctrines and ordinances of the Church of *England*. The former are fixed and immutable, the latter are equally fixed until altered by statute. This law, whether it be enforced by the ecclesiastical or by the civil tribunal, is the same, and should receive the same construction, and, when ambiguous, the same interpretation; but if it be administered by different tribunals, a variation and discordance will arise which would be much to be deplored.

In order satisfactorily to explain my meaning in this matter, it is necessary to point out what I consider to be the real position of the Church of *England* in these colonies. It is declared in the judgment of the Judicial Committee, that the Church of *England* in the colonies which have an established Legislature, and no church established by law, is to be regarded in the light of a voluntary association (1), "in the same situation with any other religious body, in no better, but in no worse, position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them."

These expressions have created some alarm, which has, as it appears to me, arisen from an imperfect apprehension of what is meant by them. They do not mean, as some persons seem to have supposed, that, because the members of such a church constitute a voluntary association, they may adopt any doctrines and ordinances they please, and still belong to the Church of *England*. All that really is meant by these words is, that where there is no state religion established by the Legislature in any colony, and in such

(1) 1 Moo. P. C. (N. S.) 461.

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a colony is found a number of persons who are members of the Church of *England*, and who establish a church there with the doctrines, rites, and ordinances of the Church of *England*, it is a part of the Church of *England*, and the members of it are, by implied agreement, bound by all its laws. In other words, the association is bound by the doctrines, rights, rules, and ordinances of the Church of *England*, except so far as any statutes may exist which (though relating to this subject) are confined in their operation to the limits of the United Kingdom of *England* and *Ireland*. Accordingly, upon reference to the civil tribunal, in the event of any resistance to the order of the bishop in any such colony, the Court would have to inquire, not what were the peculiar opinions of the persons associated together in the colony as members of the Church of *England*, but what were the doctrines and discipline of the Church of *England* itself, obedience to which doctrines and discipline the Court would have to enforce.

This is the more important to be borne in mind, because it is the want of duly considering this that has given rise not only to much misapprehension on this subject, but also, as I conceive, to still more serious results. The rule by which the Courts are bound is this:—If any number of persons, either in *England* or in any of its dependencies, associate themselves together, professing to follow a particular religion, not being the religion of the state, the Court must, when applied to, inquire into what the doctrines and discipline of that religion are, and must then enforce obedience to them accordingly. Thus, if they be Presbyterians, or Independents, or Wesleyans, or Baptists, or the like, the Court ascertains, as a matter of fact, upon proper evidence, what the doctrines, ordinances, and rules are by which the particular sect of religionists is bound, and enforces obedience to them accordingly. It is needless to cite authorities to establish this proposition. The books abound with decisions on the subject, all of the same character, many of which have been cited and referred to in the case of *Long* v. *Bishop of Cape Town* (1), and in the present case, and are familiar to every one conversant with this subject.

Thus, to apply that principle to the present case in illustration of the observations I am now making, and explanatory of the passage

(1) 1 Moo. P. C. (N. S.) 411.

I have read from the judgment in *Long* v. *Bishop of Cape Town* (1), if a class of persons in one of the dependencies of the English Crown, having an established Legislature, should found a church calling themselves members of the Church of *England*, they would be members of the Church of *England*—they would be bound by its doctrines, its ordinances, its rules, and its discipline, and obedience to them would be enforced by the civil tribunals of the colony over such persons; but if a class of persons should, in any colony similarly circumstanced, call themselves by any other name—such as, for instance, the Church of *South Africa*—then the Court would have to inquire, as a matter of fact, upon proper evidence, what the doctrines, ordinances, and discipline of that church were; and when these were made plain, obedience to them would be enforced against all the members of that church. But the fact of calling themselves in communion with the Church of *England* would not make such a church a part of the Church of *England*, nor would it make the members of that church members of the Church of *England*. If they adopted its creed and doctrines, but repudiated a part of its rules and ordinances, they would be bound by those which they had adopted, and not by those which belonged to the Church of *England*, but which they had rejected. It would, however, be incumbent upon them fully and plainly to set forth what their rules and ordinances were, and who accepted them, in order that this might prevent doubt when the Courts of law were called upon to enforce obedience to these rules and ordinances.

The whole of what I am now stating is made very distinct and clear by the whole of the decision of the Judicial Committee of the Privy Council in the case of *Long* v. *Bishop of Cape Town* (1). In that case the Judicial Committee held that Mr. *Long* had bound himself to the doctrines and discipline of the Church of *England*, and if the obedience required of him by the Bishop of *Cape Town* had been obedience to the rules and ordinances required by the Church of *England*, that obedience would have been enforced by the Judicial Committee. Accordingly, they inquired into that subject, and, having done so, held that the obedience required by the Bishop of *Cape Town* was not in accordance with the rules and ordinances of the Church of *England*, and that Mr. *Long* was jus-

(1) 1 Moo. P. C. (N. S.) 411.

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tified in resisting the summons of the bishop. This was, in fact, the real issue between the Bishop of *Cape Town* and Mr. *Long*, and the point is put distinctly, and, as I apprehend, quite correctly, by Mr. *Long*, who says, in his letters of the 29th of November and 3rd of December, 1860, that a declaration by persons that "they are members of the church of the diocese of *Cape Town*, in union and in full communion with the United Church of *England* and *Ireland*, and belonging to no other body, is, in my opinion, a declaration of virtual secession from the Church of *England*." And in another place Mr. *Long* states that he is a member of the Church of *England*, and not a member of a church in union and in full communion with the Church of *England*, which are, in his opinion, two separate and distinct things. The distinction is plain and obvious. Any church established by voluntary association may call itself in union and in full communion with any other church. A Lutheran Church established in *South Africa* might call itself in union and full communion with the Church of *England*, but the truth of the assertion is a distinct matter. But if certain persons constitute themselves a voluntary association in any colony as members of the Church of *England*, then, as I apprehend, they are strictly brethren and members of that church, though severed by a great distance from their native country and their parent church. They are bound by the same doctrines, the same rules, ordinances, and discipline. If any recourse should needs be had to the civil tribunals, the questions at issue must be tried by the same rules of law which would prevail if the question were tried in *England*—with this exception only, that the tribunal would probably be different, and that, as the statutes which constitute certain ecclesiastical tribunals in *England* do not extend to the colonies, the question would have to be determined by the ordinary civil courts which administer justice in the colonies.

It is on this principle, which I have endeavoured to enunciate, that the Judicial Committee of the Privy Council investigated and determined the case of *Long* v. *Bishop of Cape Town* (1). In the carefully considered judgment delivered on that occasion, no suggestion is made that the church established at *Cape Town*, over which Dr. *Gray* presided as bishop, is not a part of the Church of

(1) 1 Moo. P. C. (N. S.) 411.

England, nor does any doubt seem to have been entertained by the Court on that point. On the contrary, the whole judgment proceeds on the assumption, and is based on the foundation, that the church so established is a portion of the Church of *England.* That judgment states, that the Church of *England,* in places where there is no church established by law, is in the same situation with any other religious body, thereby affirming that the Church of *England* may extend to and have branches in places where it is not established by law. The judgment proceeds to state (1), that where in such places tribunals are constituted by the members of the church for the purpose of determining whether the members of that church there residing have violated any of its rules, in order to enforce the decisions of any such tribunals, recourse must be had to the Courts established by law, and such Courts will give effect to their decisions when the tribunal which pronounced it has acted "within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice." The judgment then proceeds thus (2):—

"We think that the acts of Mr. *Long* must be construed with reference to the position in which he stood as a clergyman of the Church of *England,* towards a lawfully appointed bishop of that church, and to the authority known to belong to that office in *England;* and we are of opinion that, by taking the oath of canonical obedience to his lordship, and accepting from him a licence to officiate, and have the cure of souls within the parish of *Mowbray,* subject to revocation for just cause, and by accepting the appointment to the living of *Mowbray* under a deed which expressly contemplated, as one means of avoidance, the removal of the incumbent for any lawful cause, Mr. *Long* did voluntarily submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice for any lawful cause, that is, for such cause as (having regard to any differences which may arise from the circumstances of the colony) would authorize the deprivation of a clergyman by his bishop in *England.* We adopt the language of Mr. Justice *Watermeyer,*

(1) 1 Moo. P. C. (N. S.) 461.

(2) 1 Moo. P. C. (N. S.) 462.

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that 'for the purpose of the contract between the Plaintiff and Defendant, we are to take them as having contracted that the laws of the Church of *England* shall, though only so far as applicable here, govern both.'"

Having done this, their Lordships proceed to consider whether, according to the law of the Church of *England*, Mr. *Long* had so acted as to justify his suspension and subsequent deprivation, and they determine that he had not so acted. The manner in which they characterize the assembly convened by the bishop is as follows (1):—

"It was a meeting of certain persons, both clergy and laity, either selected by the bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing, in fact, certain laws, by which all members of the Church of *England* in the colony, whether they assented to them or not, should be bound.

"Accordingly, the synod, which actually did meet, passed various Acts and constitutions, purporting, without the consent either of the Crown, or of the Colonial Legislature, to bind persons not in any manner subject to its control, and to establish Courts of justice for some temporal as well as spiritual matters, and, in fact, the synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal."

In what sense illegal? Not certainly illegal if all the members of that church had previously agreed to be bound by such an assembly, but illegal because not justified by the discipline and ordinances of the Church of *England*, by which alone Mr. *Long* had agreed to be bound. This decision, therefore, is far from deciding, that the bishop in these colonies has, by virtue of his appointment by the letters-patent, no jurisdiction and no tribunal; what it does decide is, that the tribunal of the bishop is a *forum domesticum*, and not a state tribunal; that it is not a Court of the colony of the *Cape of Good Hope*, exercising authority by reason of

(1) 1 Moo. P. C. (N. S.) 464.

the Church of *England* being the religion of the state of the colony of the *Cape of Good Hope*, but that it is a domestic tribunal of the bishop, the essence of which is, that the jurisdiction is only over those persons who assent to it, and the jurisdiction is what is usually called "consensual" jurisdiction. All the persons professing to be members of the Church of *England* are, by this decision, held to have assented to the jurisdiction of this *forum*, so far as the bishop does not overstep his authority—that is, the authority of a bishop of the Church of *England*—to the full extent that such authority is not derived from that religion being the religion of the state, or from statutes which have operation solely within the *United Kingdom*. It was because the bishop had exceeded that authority, and because the Lords of the Privy Council could not find anything in the evidence to shew that Mr. *Long* had assented to anything more than this, that they declared the sentence of the Bishop of *Cape Town* to be null and void.

It is neither necessary nor desirable that I should attempt to define the limits of the authority which a bishop of the Church of *England* could exercise in such, his *forum domesticum*, or distinguish it from those further and additional powers which can be exercised within the *United Kingdom*, which are derived from the Church of *England* being therein the religion of the state, and from those which are also derived from the provisions of statutes which have force only within that kingdom. One distinction, however, is obvious and important. A bishop in *England* is the bishop over all the inhabitants within the diocese; a bishop in the colony is bishop only over all the members of the Church of *England* resident within the colony. Whenever the question arises, as it did in *Long* v. *Bishop of Cape Town* (1)—viz., whether the act done by the bishop lies within such limited scope of his authority, that question must then be decided; and accordingly that question was in fact decided in that case.

No such question as that is now before me. All that I have to do on the present occasion is to explain how that judgment, together with the judgment in the case of *In re Bishop of Natal* (2), bears on the question before me, which is, whether the province of

(1) 1 Moo. P. C. (N. S.) 411. (2) 3 Moo. P. C. (N. S.) 115.

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Natal has been made a diocese, and whether the Plaintiff is bishop of that diocese, and as such entitled to the benefit of the endowment made for such a diocese.

On this subject an expression has been made use of in the judgment given in the latter case before the Privy Council, which is, I think, liable to be misunderstood, and which it is essential to notice. It is there stated to this effect:—The Lord Chancellor, who delivered the judgment, having observed that, after a colony has received legislative institutions, the Crown stands in the same relation to that colony as it does to the *United Kingdom*, proceeds thus (1): "It may be true that the Crown, as legal head of the church, has a right to command the consecration of a bishop, but it has no power to assign him any diocese or give him any sphere of action within the *United Kingdom*." This sentence taken literally—that is, if the words "*United Kingdom*" refer to the word diocese—is strictly correct, and such I consider to have been the meaning of the Court; but if, as some have supposed from the previous passage, it is construed to mean that the Crown can create no see or diocese in any such a colony as that of *Natal* or *Cape Town*, this, I apprehend, is not the meaning of the passage, and, if it were, the passage itself would be erroneous. To be properly understood, the sentence must be taken in conjunction with the whole context. It is not thereby intended to state that the Crown is unable to appoint a person a bishop, and direct him to exercise his functions in a colony dependent on the Crown, to the extent specified in the judgment of *Long* v. *Bishop of Cape Town* (2), within certain defined limits, where these functions do not interfere with any other see or diocese lawfully created; nor is it intended to state that the territory, the limits of which are so defined, would not constitute a see or diocese properly so called; but it is thereby intended to state that the Crown has no power to constitute a see or diocese analogous to a see or diocese within the limits of the United Kingdom of *England* and *Ireland*, investing the bishop with coercive jurisdiction. For instance, that the Crown could no more have created the see of *Natal*, and appointed to it a bishop, with all the coercive powers of an English bishop over all the inhabitants in that colony, than the Crown could have created the diocese of

(1) 3 Moo. P. C. (N. S.) 148. (2) 1 Moo. P. C. (N. S.) 411.

Ripon, or the diocese of *Manchester*, and have appointed bishops to preside over such dioceses without the authority of an Act of Parliament.

That this is the limited meaning of the passage is plain from the whole judgment. Were it to receive a wider construction it would not be in accordance with the judgment in *Long* v. *Bishop of Cape Town* (1), which it adopts and professedly follows. The decision in *In re Bishop of Natal* (2) did not decide that the Bishop of *Cape Town* had not, as bishop of the see, or diocese, any *forum* or tribunal within which he could lawfully exercise his authority as bishop of that diocese, but that it was a *forum domesticum*, which did not warrant the proceedings he instituted against the Bishop of *Natal*, and that there was nothing in his acts to give the consensual jurisdiction essential to any such *forum;* and further that, consistently with his duty as Bishop of *Natal*—that is, as a bishop of the Church of *England*—he could not give any such consensual jurisdiction. In fact, it is not the coercive jurisdiction which constitutes the see or the diocese. The early bishops of the Christian church had a see or diocese as completely before as they had after the Christian church had become the religion of the state. *Polycarp* was as much Bishop of *Smyrna*, and *Ignatius* as much Bishop of *Antioch*, as *Athanasius* was Bishop of *Alexandria*, or *Gregory Nazianzen* Bishop of *Constantinople*, although the two former could only exercise jurisdiction over the members of the Church of Christ who submitted to their jurisdiction, while the two latter possessed coercive power derived from the Christian religion having become the church of the state. When this ambiguity is removed, the two judgments are identical. The importance of them, and more especially of that of *Long* v. *Bishop of Cape Town* (1), which expounds the principle of the law, and particularly the importance of the passages to which I have referred in relation to the *status* of the Plaintiff in the district of *Natal*, is this:—It shews that the district or colony of *Natal* is a district presided over by a bishop of the Church of *England*, which is properly termed a see or diocese —that the ministers, deacons, and priests, officiating within that district, and also all the laymen professing to be members of the

(1) 1 Moo. P. C. (N. S.) 411. (2) 3 Moo. P. C. (N. S.) 115.

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Church of *England*, constitute, not a church in *Natal* in union and in full communion with the Church of *England*, but a part of the Church of *England* itself, and that all the ministers, priests, and deacons, there officiating, and all the persons composing the several flocks, are members and brethren of the Church of *England*, in the strict sense of the term. The consequence is, that they have in all matters ecclesiastical voluntarily submitted themselves to the control of the Bishop of *Natal*, so long as it is exercised within the scope of his authority, according to the principles prescribed by the Church of *England*.

If, however, any sentence of the Bishop of *Natal* should be contested, recourse must be had to the Courts established by law, which will enforce that sentence if pronounced within the scope of the legal authority of the bishop; and if he has, in arriving at that sentence, proceeded in a manner consonant with the principles of justice, and in so doing the Court established by law will proceed upon the laws of the Church of *England*, so far as they are applicable in *Natal*. In this respect, the decision in *Long* v. *Bishop of Cape Town* (1), and that in *In re Bishop of Natal* (2), are identical. And so far from arriving at the conclusion which was pressed upon me in argument in various forms, and which may be stated thus—that these decisions have established, or rather pointed out, that no legal identity exists between the church presided over by the bishops in colonies with established Legislatures and the United Church of *England* and *Ireland*,—I have arrived at the exactly opposite conclusion—that is, I have come to the conclusion that, but for these decisions, such identity, though now existing, would very speedily cease to exist.

So long as the law on this subject must, in the final resort, be administered by civil tribunals, according to the laws of the Church of *England*, to the extent that such laws are applicable in such colonies, and this with a right of appeal to the Sovereign in Council, it is reasonably certain that the law will be uniformly administered amongst all the dependencies of the Crown which possess an established Legislature and have not any religion established by law.

But if each church is to consider itself a separate and indepen-

(1) 1 Moo. P. C. (N. S.) 411. (2) 3 Moo. P. C. (N. S.) 115.

dent church, though in union and full communion with the Church of *England*, and if each church claims to possess full power to make rules and ordinances for its guidance in each separate colony, and to constitute an ecclesiastical tribunal under the bishop, and intrust him with full power to enforce such rules and ordinances without any appeal to any tribunal except to the *forum domesticum* of the Archbishop of *Canterbury* for the time being, it requires but little foresight to predict that in the course of a very short time, humanly considered, the colonial churches, though calling themselves in union and in full communion with the Church of *England*, would in forms and ordinances, and in matters of church government, differ widely from each other and from their parent church. Nor is it too much to say that some alteration of doctrine would probably in many cases follow upon the alteration in the discipline and government of the church.

Another consequence may also, I think, be reasonably predicted to arise from such a state of things, by any one who has carefully observed the disposition of the English people in such matters: if he has done so, he cannot fail to have noticed how deep-rooted an attachment to the Church of *England* exists in the people generally, even amongst those portions which are not sedulous in attendance at places of public worship—and this consequence is, that as soon as this matter shall have become clearly understood by the English resident in the colony, there will be a rapid and large secession from the church which was only in union and in full communion with the Church of *England* to the Church of *England* itself, which even in those distant colonies would receive and foster her brethren as part and parcel of her own peculiar flock.

The effect, therefore, of these decisions is, as it appears to me, that, though they have established that the letters-patent cannot create new ecclesiastical tribunals, or introduce into the colonies any of the ecclesiastical tribunals which subsist in this country, they have also established that every exercise of ecclesiastical authority, and every act of any member of the church in such colony, professing to be a part of the Church of *England*, must, in matters spiritual, be governed by the laws of the Church of *England*, and must be tried by the application of those laws.

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This is strongly illustrated by Dr. *Warren's* case (1), which is sometimes misunderstood; the Court refused to examine into the propriety of the decision of the Conference in that case, for this reason—what they did was to ascertain that, by the rules and ordinances of the Wesleyan body, every minister agreed to be bound by the decision of the Conference, and having ascertained this, the Court inquired no further. In *Long* v. *Bishop of Cape Town* (2), the Court also inquired whether, according to the rules and ordinances of the Church of *England*, Mr. *Long* had agreed to attend, and be bound by the assembly summoned by the Bishop of *Cape Town*, and the Court held that he had not.

It is the more important that the real *status* and condition of the colonial churches should be constantly present to the mind, because, as it appears to me, erroneous notions prevail to a great extent on this subject. Some persons seem to imagine that they were founded and endowed in order that the association in each colony should form a separate and independent church. So far has this been carried that it seems to be supposed that, if the members of such colonial church, or a majority of them, should so think fit, they might, if dissatisfied with the person whom the Crown had appointed to be their bishop, withdraw from his superintendence and elect a bishop for themselves.

That any number of persons, if they so pleased, might, though holding the doctrines of the Church of *England*, reject, either wholly or in part, the discipline and government of the church, though they preserved still the creed, faith, and doctrines of the Church of *England*, is unquestionable. Such an association might elect their own bishop; they might divide the district in which they reside into sees, and elect a bishop for each; they might parcel the district out into parishes and appoint a minister to officiate in each parish; all this they might do, and all this would be perfectly legal, and all this would be binding on the members of the association who assented to it:—as it is now in the Episcopal Church in *Scotland*, which is not, and by the *Act of Union* is prohibited from being, a part of the Church of *England*, and in which the Crown is prohibited from appointing or nominating any bishop. If dissensions arose amongst the members of such a

(1) Grindwood's Compendium.

(2) 1 Moo. P. C. (N. S.) 411.

church, they must have recourse to the civil tribunals; but when they did so the question would be tried by their own rules and ordinances, which would have to be proved by evidence in the usual manner. But this association would not be a branch of the Church of *England*, although it might call itself in union and full communion with it. By the law of the Church of *England*, the Sovereign is the head of the church; and in substance (for the *congé d'élire* is nothing more than a form) no bishop can be lawfully nominated or appointed except by the Sovereign, nor, as I apprehend, could any person be legally consecrated a bishop of such church unless by the command of the Sovereign. If the members of the *Inns of Court* were to present one of their preachers to the Archbishop of *Canterbury*, saying that they had elected him bishop of the *Inns of Court*, and prayed that he might be consecrated, although the most reverend prelate might feel disposed to accede to such prayer, I apprehend that he could not lawfully do so, and that upon application a prohibition would issue from the Court of Queen's Bench to prevent such a consecration. So, in like manner, the members of the church in *Natal* might elect a divine and call him Bishop of *Natal*, or invest him with any other title; but even if the Archbishop of *Canterbury* could be induced to consecrate such a person in due form, he would, I apprehend, have no legal authority to exercise any of those functions which belong exclusively to a bishop of the Church of *England*. What his peculiar *status* in the Catholic Church of Christ might be I do not profess to state; but I apprehend that he would not be a bishop of the Church of *England*, and that, when the validity of his ordinations and consecrations came to be contested in a Court of law, they would not appear to have made the persons ordained priests or deacons of the Church of *England*, nor would the places consecrated by him belong to that church.

To adopt the words of the judgment in the case of *In re Bishop of Natal* (1), "The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions."

In 1786, shortly after the American colonies had been severed from this country, it was thought necessary to pass an Act of

(1) 3 Moo. P. C. (N. S.) 148.

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Parliament to enable the Archbishops of *Canterbury* and *York* to consecrate candidates for episcopacy in countries not under the dominion of the Crown; but even this permission was not granted without the license of the Crown for each particular case being first obtained; and the statute also provided that no person so consecrated should exercise any episcopal functions within the *United Kingdom* (1).

In 1819 the Archbishops of *Canterbury* and *York* were empowered by the Legislature to ordain persons specially for Her Majesty's colonies. The statute provided that no person not ordained by any Bishop or Archbishop of *England* or *Ireland* should officiate in any church in *England* or *Ireland* without the special permission of the archbishop of the province, or hold any ecclesiastical preferment, or act as curate therein, without the consent of the archbishop of the province, and also of the bishop of the diocese; and the statute also provided that no person ordained by a colonial bishop, who did not at the time possess episcopal jurisdiction over some diocese, district, or place, and also reside therein, should hold any ecclesiastical preferment within Her Majesty's dominions, or officiate in any place as a minister of the Church of *England* and *Ireland* (2).

In 1840 the Legislature permitted the clergy of the Episcopal Church in *Scotland*, and in the *United States of America*, to officiate for one or two specified days, on a permission given in writing by the bishop of the diocese, in a specified church within the *United Kingdom*, with consent of the incumbent (3).

In 1852 an Act (4) was passed, which enacted that nothing contained in the two last-mentioned Acts, and also in two Acts (5) therein recited, and which are also mentioned in the judgment of the Privy Council, and which referred to bishoprics in *India*, should extend to any person who, upon the request and by the commission of the bishop of any diocese in *England* or *Ireland*, should have been ordained a deacon or priest within the limits of such diocese by any bishop who, by virtue of Her Majesty's letters-patent, should have exercised the office of bishop in *India* or in any of

(1) 26 Geo. 3, c. 84.
(2) 59 Geo. 3, c. 60.
(3) 3 & 4 Vict. c. 83.
(4) 15 & 16 Vict. c. 52.
(5) 53 Geo. 3, c. 155, and 3 & 4 Will. 4, c. 85.

Her Majesty's colonies or foreign possessions; and it enacted that all admissions to benefices in the United Church of *England* and *Ireland*, and all appointments to act as curates and chaplains therein of persons so ordained, should be valid in law (1).

In the following year this was extended, and by 16 & 17 Vict. c. 49, it was enacted that, notwithstanding the provision in the recited Acts to the contrary, "all persons who have been or hereafter shall be ordained by any of the said bishops in or for the diocese of the bishop of any other of Her Majesty's foreign or colonial possessions, upon his request in writing shall be entitled to all the same rights, privileges, and advantages, as if he had been ordained by such bishop within the limits of a diocese over which he was at the time himself actually exercising jurisdiction and residing therein." It is impossible to read these Acts, and not to see that the provisions therein contained apply, so far as the colonies are concerned, exclusively to the acts of bishops who exercise the office of bishop in such colonies by virtue of Her Majesty's letters-patent. This is expressed in the statute of 1852 (1), and in the Act I have last mentioned is repeated by referring to the bishops mentioned in the previous statute. Throughout all these statutes it is pointed out by irresistible inference that no bishop of the Church of *England* can be created without the authority of the Crown: and also that the authority of Parliament is required to make the ordinations and acts of bishops in Her Majesty's foreign possessions effectual within the *United Kingdom*. All these statutes, therefore, appear, both directly and indirectly, to confirm the view I have taken of this part of this case.

To sum up the conclusions shortly, in my opinion the case stands thus:—

The members of the Church in *South Africa* may create an ecclesiastical tribunal to try ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved the civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association—that is, against all the persons who had agreed to be bound by

(1) 15 & 16 Vict. c. 52.

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these decisions, and it would do so without inquiring into the propriety of such decisions. But such an association would be distinct from, and form no part of, the Church of *England*, whether it did or did not call itself in union and full communion with the Church of *England*. It would strictly and properly be an Episcopal Church, not *of*, but *in South Africa*, as it is the Episcopal Church *in Scotland*, but not *of Scotland*. But if the Episcopal Church in *South Africa* chose to remain part of the United Church of *England* and *Ireland*, then no such irresponsible tribunals could exist, and when recourse is had to the civil tribunal to enforce obedience to these decisions, they must be subject to revision to the extent I have already pointed out as laid down by the judgment in the case of *Long* v. *Bishop of Cape Town* (1). In one case it is one church in all the colonies, each association being part of the parent church of the United Kingdom of *England* and *Ireland*; in the other case they are separate and distinct episcopal churches, each existing separate in each colony, and distinct from every other church, bound by their own canons only, and no more bound by the canons of any other church than they would be by the canons of the Episcopal Church in *Scotland*, according to their final settlement by the last synod held in *Edinburgh* in 1860 for that purpose, and all of them rejecting, as the Church in *Scotland* is compelled to do, the thirty-seventh of the Articles of the English Church, which puts the sovereign at the head of the church.

I have gone so fully into this subject, because the full comprehension of what is the actual position of the church founded and endowed in these colonies by members of the Church of *England* is of the highest importance, for the purpose both of determining what the *status* of the Plaintiff is, and also of disposing of the remaining point I have to consider, which was strongly urged upon me—viz., how far the objects and intention of the persons who contributed the funds for founding the bishopric of *Natal* have been fulfilled. It was urged that to continue the payment of the stipend to the Plaintiff, having regard to his actual legal *status*, would be in the nature of a breach of trust. Except in the case of one contributor, I have not before me any distinct evidence

(1) 1 Moo. P. C. (N. S.) 411.

of what were the objects of the persons generally who advanced the funds, further than this, that they desired to found a bishopric in the colony of *Natal*.

But this one, who is said to be the principal contributor, is a lady, who, with her constant boundless charity, has supplied very large funds for the purpose of endowing colonial bishoprics, and who has addressed a letter on the subject to the Archbishop of *Canterbury*, which has been produced in evidence, and has been brought prominently forward in the discussion of this question. The letter itself is carefully written, and has, I assume, undergone final revision and approval from the advisers of this lady before it was published. In this letter are the following passages, which contain the substance of the argument addressed to me on this subject:—

"I had always supposed that in undertaking to provide funds for the endowment of colonial sees I was co-operating with the archbishops and bishops of the United Church of *England* and *Ireland* in laying the foundation of efficient church government for the members of our national church resident in the respective colonies, and that the Crown, by its letters-patent, had power to give legal effect to an order of things calculated to secure that the doctrine and discipline of the Church of *England*, by law established, should be maintained in their completeness amongst the congregations of our own communion in those colonies. Without this security I should not have guaranteed the endowment funds, and upon the faith of this having been accomplished by the issuing of Her Majesty's letters-patent, I fulfilled in each case my guarantee.

"The declaration, however, of the state of the law, which is to be found in the Report of the Judicial Committee of Her Majesty's Privy Council upon the case of the Bishops of *Cape Town* and *Natal*, has drawn my attention more particularly to the fact, that the conditions upon which I undertook to make provisions for the endowment of a bishop's see at *Cape Town* have not been fulfilled by Her Majesty's letters-patent, and I find, with much painful surprise, that the bishop nominated to the see of *Cape Town* is declared in that report not to have any effective ecclesiastical jurisdiction, and my anxiety is increased by the advice which I

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have received from eminent counsel, that the letters-patent of the Crown purporting to erect the sees of *Adelaide*, and *British Columbia*, and *Vancouver's Island*, with jurisdiction over the clergy in those colonies may prove to be equally ineffectual with the letters-patent of *Cape Town*" (1).

It will be seen, by the observations I have already made, that, in my opinion, this letter is written in misapprehension of the real effect of the decisions of the Judicial Committee in the two cases referred to. The writer observes that she would not have guaranteed the funds unless upon the faith that the Crown, by its letters-patent, had power to give legal effect to an order of things calculated to secure that the doctrine and discipline of the Church of *England*, by law established, should be maintained in their completeness amongst the congregations of our own communion in these colonies. If I am right in the observations I have made upon the effect of the decisions of the Privy Council, this object will be far better accomplished by securing an uniform administration of the same law throughout all the colonies, instead of founding separate and independent churches, each framing its own rules of discipline. Afterwards the writer finds, with the most painful surprise, that the bishop nominated to the see of *Cape Town* is declared not to have an effective ecclesiastical jurisdiction. This, again, appears to me to spring from a misapprehension. It is not declared by the judgment of the Privy Council that the Bishop of *Cape Town* has no effective ecclesiastical jurisdiction, unless in the word "effective" is included the word "irresponsible." The judgment of the Privy Council has declared, in the case of Mr. *Long*, that the bishop of *Cape Town* has an effective ecclesiastical jurisdiction, provided it be administered in accordance with the doctrine and discipline of the Church of *England*, and in a manner consonant with the principles of justice. That if it be so administered it will be enforced and carried into execution by the power of the civil tribunals, but that if it be not so administered it is a nullity; and that whether it be or be not so administered is a question to be deter-

(1) Immediately after the judgment was delivered, Miss *Burdett Coutts* wrote to inform the Master of the Rolls that she was not one of the subscribers to the *Natal* fund, and that she had taken no part whatever in the opposition to the payment of the salary of the Bishop of *Natal*.

mined by the civil tribunals of the colony, with an ultimate appeal to the Sovereign in Council. If, indeed, the persons who contributed these funds did so on the faith that the decision of the bishop in the colony, or of the Archbishop of *Canterbury*, on an appeal to him in his domestic tribunal, should be final; and further, that that decision should not be questioned in any Court of justice, not even in the Court of Arches, the ecclesiastical Court of the archbishop, but which is presided over by a layman, and from whose decisions an appeal lies to the Queen in Council, then unquestionably this object is not accomplished by the letters-patent: but there is not anything that I can find in the previous correspondence, or in these letters-patent, which purports to effect this, or which ought to have induced the subscribers to expect that such a result would be obtained. And it is further to be observed that such a result would have involved a principle which would have been wholly repugnant to the foundation on which the discipline of the Church of *England* rests, which makes the Sovereign the supreme head of the church in all her dominions, a principle which is expounded and enforced in the thirty-seventh of the Articles of Religion of the English Church. I cannot, therefore, from this letter, or from any other document before me, come to the conclusion that the object of the persons who contributed to form a fund to endow bishoprics in the colonies dependent upon *England* was to elevate the church over the throne, or to depose the Sovereign from being the head of the Church of *England* in the colonies dependent on her.

But even if this were the case, and that the object of the persons who contributed the funds for endowing the bishopric of *Natal* has failed, this would not dispose of the question.

This was a contract entered into by three parties to it—the Crown, the trustees of the fund, on behalf of the contributors, and the Plaintiff, and although it is true that this Court will occasionally refuse specifically to enforce a contract where one of the parties who entered into it did so by mistake, and while ignorant of the real state of the case, yet, where the contract has not only been entered into, but has also been acted upon, and where it is impossible to restore all the parties to it to the same position which they were in before the contract was made, the Court of

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Chancery never annuls the contract. Who now can restore the Plaintiff to his former position in 1853? Assume that the contributors can truly say:—"We subscribed this fund to make the Plaintiff a bishop, with coercive powers, inherent in his own episcopal jurisdiction. We find that the Plaintiff, as bishop, must have recourse to a Court of law for that purpose, and therefore we annul the engagement"—could any Court listen to such arguments, or could such a doctrine be admitted to annul the contract? All persons are bound to know the law. Ignorance of the law, according to the hackneyed, but most necessary maxim in our jurisprudence, and, indeed, in every jurisprudence, excuses no one. The contributors, therefore, must be treated as knowing, or as being bound to know, that to enforce the decision of the bishop he must have recourse to a Court of civil jurisdiction, and that the Court so resorted to would sit in judgment upon and review the correctness of the decision to this extent—that the Court would ascertain whether the bishop had acted within the scope of his authority, and had proceeded in a manner consonant with the principles of justice, and the Plaintiff might justly say to the contributors:—"You cannot now recede from your engagement, because that is made manifest to you which, from the first, you must or ought to have been well acquainted with."

These last observations would, unquestionably, not apply to the next person who might be appointed Bishop of *Natal*, if a vacancy should occur. With the successor a fresh contract would have to be made, the terms of which, expressed or implied, would bind the parties to it, but that has nothing to do with the Plaintiff.

I am, therefore, of opinion that the views and objects of the persons who contributed the fund, whatever effect it may have with respect to any future appointment, cannot be called in aid for the purpose of depriving the Plaintiff of his salary as Bishop of *Natal*. I must also say, that the more I consider this part of the case, the more strongly I am impressed with the belief that the real state of the case, and the real effect of the decisions of the Privy Council, have not been present to the minds of the persons who, having subscribed the funds for the endowment of the bishopric, now object to the application of them for payment of the income of the Plaintiff.

The practical effect of the decision is simply this, that an appeal, to the extent I have stated, lies from the decisions of the bishop in the colonies to the Courts of law in those colonies, and from thence to the Privy Council. Is it really believed by any large number of the contributors to these funds, that this is an order of things ill calculated to secure "that the doctrine and discipline of the Church of *England*, by law established, should be maintained in their completeness amongst the congregations of our own communion in these colonies?" Can it be fairly said, that "the bishop nominated to the see of *Cape Town* is declared to have no effective ecclesiastical jurisdiction," because his decisions are liable to be revised by a Court of law to this extent—that wherever he exceeds the scope of his authority, as established by the rules and discipline of the Church of *England*, and wherever he does not proceed in a manner consonant with the principles of justice, his decisions are void and of null effect? The Bishop of *Cape Town*, the Bishop of *Natal*, the bishops of all colonies similarly circumstanced—*i. e.*, having an established Legislature, but having no established church, can, as regards the ministers and congregations of the Church of *England* within their diocese, exercise all the powers of a bishop; they can ordain, confirm, and consecrate; they can do more—they can visit, investigate, reprove, suspend, and deprive; and if, in so doing, they keep within the due scope of their authority as established by the discipline of the Church of *England* as by law established, and proceed in the exercise of that authority in a manner consonant with the principles of justice, their acts are valid, and will be enforced by the legal tribunals. It is only when their acts fail in these respects, when they exceed their authority as regulated by the law of the Church of *England*, or when they proceed in a manner not consonant with the principles of justice, that the bishops cease to be able to enforce their decisions. Surely this is not such an evil as to make subscribers believe that they have applied funds for the purpose of constituting an order of things which, in the colonies, will fail to secure "maintenance of the doctrine and discipline of the Church of *England* by law established." I am also at a loss to understand why the prelate so appointed is less a bishop because he does not possess coercive jurisdiction, incidental to an episcopal tribunal, to try ecclesiastical

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offences within his diocese, of which he is the head, than because he is deprived of, or rather has not had conferred upon him, the administration of the personal property of deceased persons which did formerly belong to an English bishop in *England*.

The three powers belonging to a bishop, according to all principal authorities, are—first, the power *ordinis;* second, *jurisdictionis;* third, *administrationis rei familiaris.* The colonial bishop possesses the first unfettered, without control or appeal; the second he possesses in this way—that he must apply to lay tribunals to enforce his decisions, which lay tribunals will review them, and consider their correctness according to the law which the bishop himself is bound to administer, to the extent I have above stated; the third he does not possess at all: it was not ever proposed to be given to him; it belongs to a different officer, and to a different tribunal. The absence of this authority, or of this power, does not disturb the Defendants; it does not, in their opinion, or, indeed, in the opinion of any one, affect his *status* as a bishop; but because a fetter is imposed on the second of his powers, by which he is constrained, when the matter is questioned before a Court of law, to shew that he has exercised his jurisdiction within the scope of his authority as established by the law of the Church of *England*, and also that he has proceeded in a manner consonant with justice, it is supposed that he is no longer the bishop of a diocese, and that the object which the subscribers had in view in causing his appointment is entirely frustrated.

It is, no doubt, open to all tribunals to err, and it may, and probably does, appear to many persons who have carefully considered, and who take a deep interest in, this subject, that the lay tribunal is less likely to understand, and less likely fully to appreciate, the bearing and importance of a religious question, though one relating solely to the extent of the bishop's authority and his mode of exercising it, than a tribunal composed of ecclesiastical personages would do; and this consideration unquestionably opens a very large question, which is, whether it is a beneficial condition of things that the state should be superior to the church in matters ecclesiastical. But the solution of this question does not lie within my province; it cannot affect my decision on the present occasion: it is sufficient for me to point out that the

fundamental principle of the Church of *England* puts the Sovereign at the head of all causes, ecclesiastical as well as civil, and consigns the decisions of matters ecclesiastical in the last resort to the Sovereign herself, with the assistance of the members of her Privy Council.

In reviewing the whole of this case, it is impossible not to look a little at ulterior consequences, and although it is not safe, when expounding the law on any subject, to rely on the results of the decision, still it may not be improper to point out what would be some of the difficulties which would arise if I were to adopt the arguments of the Defendants and dismiss the Plaintiff's bill. If no portion of the funds of which the Defendants are trustees can be applied towards the payment of the salary of the Bishop of *Natal*, no portion of these funds can properly be applied towards the payment of the salary of any other colonial bishop similarly circumstanced. Are no more bishops to be appointed in colonies having an established Legislature and having no established church? Are the ministers and congregations of the Church of *England* in such colonies to be left without the advantages which are found to flow from the superintendence and watchful care of a bishop?

Another difficulty, and one which would seriously affect the Defendants, is this: If the suit of the Plaintiff were dismissed, what is to be done with the money dedicated for the endowment of a Bishop of *Natal*, and the accumulated income since 1864? Is it to go on accumulating? Is it to be retained by the trustees for their own benefit because no *cestui que trust* exists? Can it be returned to the subscribers? and if not, is it to be applied *cy près?* The mere statement of these propositions shews that it is impossible that any one of them should be adopted. In my opinion the truth is shortly this: these funds were subscribed to induce the Crown to appoint a Bishop of *Natal*. The Crown acceded to that wish of the subscribers, and by letters-patent appointed the Plaintiff Bishop of *Natal*, and the Archbishop of *Canterbury* has duly consecrated him Bishop of *Natal*, in compliance with the directions of the Sovereign, and accordingly the Plaintiff is Bishop of *Natal* in every sense of the word, and will remain so until he dies, or resigns, or until the letters-patent appointing him are

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revoked, or until he is in some manner lawfully deprived of his see.

I cannot, however, conclude the observations I have to make on this case without guarding against a misapprehension which might seem to flow from the words I have last used, as if I were of opinion that the Plaintiff could not by any means be removed from being Bishop of *Natal*. Such is not my opinion. I wish it to be distinctly understood that I do not mean to assert that as soon as the Plaintiff's nomination by the Crown and his appointment by letters-patent had been consummated by his consecration by the archbishop, whatever might be his conduct or opinions, he must for ever remain Bishop of *Natal*, and enjoy the endowments attached to that office, even though the letters-patent appointing him had never been revoked. On the contrary, I entertain no doubt that if he had not performed his part in the contract entered into by him, that if he had failed to comply with "the covenants of his trust," he could not compel payment of his stipend. The contract he has entered into is involved in the words "Bishop of the Church of *England* as by law established." The duties, the teaching, the superintendence, the pastoral care, the watching of his flock, which appertain to a bishop, he undertook and was bound to perform; and if, by his own wilful default, this has become impossible, I do not mean to lay down that he could maintain a suit in this Court for the payment of his salary as Bishop of *Natal*.

If, for instance, he had renounced the faith of a Christian, or if he had renounced the doctrines and precepts of the Church of *England*, I do not mean by anything I have stated to suggest that he could have retained his position as bishop, or have enforced the payment of his salary; in fact, the contrary has been laid down in several cases which have come before this Court, as, for instance in *Attorney-General* v. *Welsh* (1), where an endowment was made for a society of Presbyterians in communion with the Church of *Scotland*, and the ministers and majority of the congregation seceded to the Free Kirk, it has been held that the minority who still clung to the Church of *Scotland*, was entitled to keep the endowment and to appoint another minister; and the like has been decided in many other cases. But, as I observed at the

(1) 4 Hare, 572.

outset of these observations, no such case as that which I have suggested has been presented to me, nor, having regard to the pleadings in this suit, could such a case have been argued before me. Not a word in the pleadings and evidence before me is breathed against either the moral character or the religious opinions entertained by the Plaintiff.

Of course it would be foolish in me were I to pretend ignorance of what has been at the root of the proceedings against the Plaintiff in *Cape Town*, and of the refusal of the Defendants to pay to the Plaintiff the income attached to the bishopric of *Natal*, but judicially in this case, where I am bound to proceed *secundum allegata et probata*, I am bound to ignore this matter altogether. Whether, if the case had been raised, I should have suspended my judgment on it until proceedings had been taken by *scire facias* in the Courts of common law, or until recourse had been had by Petition to the Sovereign, whom the members of the Church of *England* in *Natal* might, as I apprehend, have petitioned on this subject, it is unnecessary for me now to speculate. This I hold certain, that if no other Court could have been found to try the question, I should have been bound to do so; and, consequently, all that it is necessary for me to state on the present occasion is, that this question might have been raised, that if raised I must have entertained it, and might have been compelled to decide upon it, but that in the manner in which this case has been presented to me, it is fit that I should repeat once more that I have been compelled to consider it on the assumption that the Plaintiff is in every respect perfectly fit and proper to fill the office of bishop, and to dispense his pastoral care and protection over the flock of members of the Church of *England* residing within the diocese of *Natal*.

I must, therefore, pronounce a decree in the terms of the prayer of the Plaintiff's bill. It follows that the Defendants, the trustees, must pay the Plaintiff's costs. I do not blame them for the course they have pursued. Considering the pressure put on them by or on behalf of the persons who contributed the funds, and who would scarcely have been satisfied if the trustees had acted without the decision of a Court of law, it was probably impossible for them to have acted otherwise than they have done. This, however, though it may be a very good reason for holding that

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they ought to be allowed the expenses to which they will have been put out of the fund which they administer, is no reason for denying the Plaintiff his costs, who, so far as this suit is concerned, has, in my opinion, been in the right throughout.

He must pay the Attorney-General his costs of this suit, and add them to his own costs, which he must recover against the Defendants, the trustees.

There has been no separate answer, or, as I suppose, any extra expense occasioned to either side by the appearance of the Primates, and I say nothing, therefore, with regard to their costs. If there be any such extra costs, I can neither give them any, nor require them to pay any.

Solicitors for the Plaintiff: Messrs. *Shaen & Roscoe.*

Solicitors for the Defendants: Messrs. *Pemberton & Co.; The Solicitor for the Treasury.*

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SEWELL *v.* CREWE-READ.

Mortmain—Legacy to be applied in building Parsonage.

A legacy to be applied in building a parsonage-house is not within the *Mortmain Act*, if there is glebe land belonging to the living upon which a house may be built.

A., by his will, directed his executors to lay out £1000 "in building the parsonage-house at *C.*, as he had promised the same." There was glebe land belonging to the living of *C.*, but no parsonage-house. Before the will was made, other persons had, at *A.'s* instigation, purchased land at *C.*, with the intention of dedicating it as a site for a parsonage-house, but had not so dedicated it:—

Held, that the bequest was valid, and not within the *Mortmain Act.*

THIS was the hearing for further consideration of a suit for the administration of the personal estate of the Rev. *Charles Crewe.* The principal question was as to the validity of a bequest in the testator's will, which was in these terms:—"I direct my executors to stand seised of the sum of £1000, and to lay out, or pay over the same, in building the parsonage-house at *Chaseley*, in manner as I have already promised the same." The will was dated the

4th of February, 1857; the testator died on the 26th of May, 1864. In 1849, the testator induced the Dean and Chapter of *Westminster* to purchase the copyhold interest in a piece of land in the parish of *Chaseley*, held of a manor of which they were lords, for the purpose of dedicating it as a site for a parsonage-house. The land had not been conveyed by the dean and chapter, but they were willing to convey it on condition that the parsonage-house should be erected upon it out of the money bequeathed by the testator for that purpose. The testator had, in May, 1851, in a letter to the incumbent of *Chaseley*, expressed his intention to leave £1000 for the purpose of erecting a parsonage-house there. There was, at the date of the will, glebe land belonging to the living of *Chaseley*, but no parsonage-house.

Mr. *Eddis*, for the Plaintiffs, legatees.

Mr. *Selwyn*, Q.C., and Mr. *Cookson*, for the Defendant, the executor and residuary legatee:—

To the extent of £500 the legacy is valid, under the 43 Geo. 3, c. 108, but beyond that amount it is void, under the *Mortmain Act*, 9 Geo. 2, c. 36. The *onus* is upon the person claiming the legacy of shewing that the testator intended the money not to be employed in the purchase of land: *Attorney-General* v. *Nash* (1); *Giblett* v. *Hobson* (2); *Trye* v. *Corporation of Gloucester* (3). Here the only circumstances which can be relied on for that purpose are the existence of glebe land belonging to the living, and the purchase of the piece of land by the Dean and Chapter of *Westminster*. But if the fact of there being glebe land, upon which a parsonage-house can be erected, were sufficient to take such a legacy out of the operation of the *Mortmain Act*, the 43 Geo. 3, c. 108, so far as it purports to give validity to bequests of money not exceeding £500, for the purpose of building parsonage-houses, would be superfluous. The purchase by the dean and chapter was made long before the date of the will, and no steps had been taken to bring the land so purchased into mortmain, nor were the dean and chapter in any way bound to do so. There is nothing

(1) 3 Bro. C. C. 588. (2) 3 My. & K. 517.
(3) 14 Beav. 173.

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in the words of the bequest pointing to any particular site for the parsonage-house.

[THE MASTER OF THE ROLLS referred to *Philpott* v. *Governors of St. George's Hospital* (1), and *Dixon* v. *Butler* (2).]

In *Philpott* v. *Governors of St. George's Hospital*, the testator expressly prohibited the application of any part of the legacy in the purchase of land; in *Dixon* v. *Butler*, the legacy was clearly good under 43 Geo. 3, c. 108, so that the decision as to its validity with reference to the *Mortmain Act* was a mere *dictum*.

Mr. *Baggallay*, Q.C., and Mr. *Horton Smith*, for the incumbent of *Chaseley*, were not called upon.

LORD ROMILLY, M.R.:—

I am of opinion that this legacy is valid, and that the testator, by directing the money to be laid out in building the parsonage-house, has distinctly indicated an intention that it was to be laid out, not in the purchase of land, but in building a house, either on the glebe land, or on the land which had been purchased by the Dean and Chapter of *Westminster*. The case of *Dixon* v. *Butler*, which was argued and decided without reference to the statute 43 Geo. 3, c. 108, and was approved of by the House of Lords, in *Philpott* v. *Governors of St. George's Hospital*, appears to me to go further than the present case in favour of the validity of such a legacy.

Solicitors for the Plaintiffs and Defendant: Messrs. *Rhodes, Son, & Duffett*.

Solicitors for the Incumbent of *Chaseley*: Messrs. *Wilkins & Blyth*.

(1) 6 H. L. C. 338. 3 Jur. N. S. 1269.

(2) 3 Y. & C. Ex. 677.

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1866
Nov. 5, 6.

Power—Successive Appointments—Cumulative or Substitutionary—Election.

Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, and the person in whose favour the appointments are made will be compelled to elect between them.

A person having a power of appointment, by deed or will, over a fund, in favour of his children, upon the occasion of the marriage of one of his daughters, Mrs. *E.*, appointed one-seventh to her; and upon the marriage of another of his daughters, Mrs. *L.*, appointed another one-seventh to her. He afterwards executed a deed-poll, by which, without noticing the previous appointments, he gave one-sixth of the fund to Mrs. *E.*, another sixth to Mrs. *L.*, three other sixths to other children; and left one-sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children:—

Held, that the appointments to Mrs. *E.* and Mrs. *L.*, made by the deed-poll, were in substitution for those previously made, and raised a case of election; and that the will operated as an appointment of so much of the fund as was not disposed of by the deed-poll.

BY a settlement, dated the 1st of January, 1803, and made on the occasion of the marriage of *Francis Dancer* and *Frances Jane Pryllmead*, his wife, after making provision for enabling the trustees thereof to insure the life of *Francis Dancer* for £5000, in the *Equitable Life Assurance Office*, or any other life assurance office in *London* or *Westminster*, it was agreed that the said sum of £5000 so to be insured, together with all such advantages and interests as might accrue under or by virtue of any of the regulations of the assurance office in respect of such insurance, should, as soon as might be after the death of *Francis Dancer*, be invested in consols, or any other of the public funds, in the joint names of the trustees; and that they and the survivor of them should stand possessed thereof upon trust to pay the interest and dividends thereof to Mrs. *Dancer* for her life; and after her decease in trust for all and every, or any such one or more of the children of the said *Francis Dancer* by the said *Frances Jane Pryllmead*, his wife (other than and except an eldest or only

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son), payable at such time or times, and in such shares, proportions, manner and form, and with such limitations over among them, as the said *Francis Dancer* should from time to time, and at any time or times, by any deed or deeds, writing or writings, with or without power of revocation by him, sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, direct, limit, or appoint, give or bequeath the same, and in default of such direction or appointment then as the said *Frances Jane Pryllmead*, his intended wife, should in like manner appoint; and in default of any such appointment, and subject to such, if any, in trust for all and every the child or children of the said *Francis Dancer* by the said *Frances Jane Pryllmead*, his wife (other than and except an eldest son as aforesaid), until they respectively, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain that age or be married, whichever should first happen; and then in trust for all and every of such children (except as aforesaid), as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or be married, whichever should first happen, equally to be divided among all such children, except as aforesaid, if more than one share and share alike as tenants in common. The settlement contained a hotchpot clause; and it was thereby also agreed that a sum of £1500, £3 per Cent. Bank Annuities, which were then vested in the trustees, should be held subject to life interests thereby given to *Francis Dancer* and *Frances Jane Pryllmead*, his wife, upon the same trusts as were therein declared respecting the sum of £5000 after the death of *Francis Dancer*.

Mrs. *Dancer* died in 1863, having had thirteen children, four of whom died in infancy. Of the others, *Francis Robert*, the eldest son, and *John Herbert*, died before 1850, unmarried; *Amelia* died in 1852, having attained twenty-one, but unmarried; *Edward Cussans* went abroad, and was found by the Court to have died before the 25th of May, 1850; *George* died after attaining twenty-one, having married, and leaving a wife and children surviving him; *Eleanora Calvert* became the wife of *Henry Pattison*, and died in 1849, leaving her husband and a son surviving her; and the

rest, viz.: *Frances Laura*, the wife of *Ebsworth England*, *Georgiana*, the wife of *Thomas Lavers*, and *Yorke Godfrey*, were still living. *Francis Dancer* himself died in 1864.

A policy on the life of *Francis Dancer* was duly effected with the *Equitable Life Assurance Office*, and on his death produced a sum which was invested in £29,369 17*s.* 2*d.* consols.

By an indenture executed in 1838, in contemplation of the marriage of Mrs. *Lavers*, *Francis Dancer* appointed that after the death of the survivor of him and his wife, one equal seventh part or share of the said sum of £5000 insured on his life, and of the said sum of £1500, £3 per Cent. Reduced Bank Annuities, and of the investments thereof, should go to Mrs. *Lavers* (then *Georgiana Dancer*); and she, with the consent of her then intended husband, thereby assigned the said shares to trustees upon trusts for the benefit of herself, her husband and children. This deed contained a covenant for the settlement of Mrs. *Lavers'* after-acquired property.

A similar settlement of another seventh part was executed in 1839, in contemplation of the marriage of Mrs. *England*.

On the occasion of Mrs. *Pattison's* marriage no appointment was made of any share in the above funds; but a settlement was executed, which contained a covenant for the settlement of any share of the said fund to which Mrs. *Pattison* might become entitled under the trusts of the settlement of 1803, or any appointment to be made in pursuance thereof.

A deed-poll, dated the 25th of May, 1850, was executed by *Francis Dancer*, in conformity with the requirements of the power of appointment given to him by the settlement of 1803; and he thereby irrevocably directed and appointed that one equal sixth part of the said sum of £5000 assured by the policy therein mentioned, and all bonuses and other moneys to be had, recovered, and received, under or by virtue thereof, and of the stocks and funds in which the said sum of £5000, bonuses, and other moneys, should be invested, and of the dividends, interest, and annual produce thereof, and also one equal sixth part of the said sum of £1500, £3 per Cent. Reduced Bank Annuities, and of the dividends, interest, and annual produce thereof, should from and after the decease of the survivor of them, the said *Francis Dancer* and *Frances Jane*

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Pryllmead, his wife, remain and be in trust for the said *Frances Laura England*, her executors, administrators, and assigns. He then proceeded to make appointments in exactly similar terms of one-sixth share of the same funds to Mrs. *Lavers*, *Amelia Dancer*, and *Edward Cussans Dancer* respectively, the appointment in favour of *Edward Cussans Dancer* being followed by a proviso in the following terms: "Provided nevertheless, that if the said *Edward Cussans Dancer* shall have departed this life before the day of the date of these presents, then and in such case the said one equal sixth part in and by these presents appointed to the said *Edward Cussans Dancer*, his executors, administrators, and assigns, shall remain and be upon the trusts following, that is to say, as to one equal fifth part thereof in trust for the said *Frances Laura England*, her executors, administrators, and assigns, as to one other equal fifth part thereof in trust for the said *Georgiana Lavers*, her executors, administrators, and assigns; as to one other equal fifth part thereof in trust for the said *Amelia Dancer*, her executors, administrators, and assigns; as to one other equal fifth part thereof in trust for the said *Yorke Dancer*, his executors, administrators, and assigns; and as to the remaining one equal fifth part thereof, upon and for such trusts, intents, and purposes, expressed by and in the hereinbefore recited indenture of settlement of the 1st of January, 1803, as shall then be subsisting and capable of taking effect." There followed an appointment of another sixth share of the funds to *Yorke Dancer* in exactly similar terms to those made to Mrs. *England*, Mrs. *Lavers*, and *Amelia Dancer*.

The appointments made in 1838 and 1839 were not recited or noticed in this deed-poll; nor was any notice taken of the remaining one-sixth of the funds.

By his will, dated the 9th of May, 1863, *Francis Dancer*, after reciting his marriage settlement, by virtue and in exercise of the powers thereby given, and of every other power enabling him in that behalf, directed and appointed, and also bequeathed, all the moneys which might arise or be received from the said policy of assurance, and the said sum of £1500 Reduced Bank Annuities, or the stocks, funds, or securities, which had been or might be substituted for the same, or any part thereof, or so much, or such parts or shares thereof respectively, as were not then

already appointed to, or in favour of, any of his children, unto trustees; and he directed that such trustees should hold the said funds upon trust, as to one-third thereof, for Mrs. *England*, for her separate use; as to another third thereof, for Mrs. *Lavers*, for her separate use; and as to the remaining, for *Yorke Godfrey Dancer*, for his life, subject to a proviso for determining such life interest, and, after his decease, upon trust for Mrs. *England* and Mrs. *Lavers* in equal shares.

The suit was instituted by the trustees of *Francis Dancer's* will for the administration of the trusts of the settlement of 1803, and now came on to be heard on further consideration.

Mr. *Selwyn*, Q.C., and Mr. *Druce*, for the Plaintiffs.

Mr. *Davey* (Mr. *Baggallay*, Q.C., with him), for the trustees of Mrs. *Lavers'* and Mrs. *England's* marriage settlements:—

We contend that one-seventh of the fund was appointed by each of the marriage settlements of 1838 and 1839; that the deed-poll operated only on the remaining five-sevenths; that Mrs. *Lavers* and Mrs. *England* became each entitled under it to one-sixth of those five-sevenths, and, in the events which have happened, to one-fifth of another sixth; and that under the will they are each entitled to one-third of what remained unappointed by the settlements and the deed-poll. When an appointment is made of a part of a fund, that part is thereby taken out of the fund. The appointments of 1838 and 1839 thus took two-sevenths out of the fund. The deed-poll shews no intention on the part of the donee of the power to revoke these previous appointments, and, in fact, they were irrevocable. The deed-poll thus only affects the remaining five-sevenths: *Trollope* v. *Routledge* (1).

This is not a case for the application of the rule of double portions. That rule applies only where a father is making provision for his children out of his own funds, and not where he is a mere hand for distributing certain funds. Besides, the shares appointed are not identical; there are such material differences between them as would prevent the operation of the rule, even if it could be held, on other grounds, to apply. Nor, again, is this a

(1) 1 De G. & Sm. 662.

M. R. 1866 ENGLAND v. LAVERS.

case where the doctrine of election applies; for, in the first place, in order to raise a case of election, there must be two funds: *Bristow* v. *Warde* (1). And, in the next place, where a testator or settlor has a sufficient interest to feed the gift, the Court will not assume that he meant to dispose of that over which he had no power: *Maddison* v. *Chapman* (2).

Our construction of the deed-poll is further supported by the language of the will, in which he begins by disposing of the whole fund, just as if he had made no previous appointment of it.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for *Yorke Dancer*:—

The simple question is, are these gifts cumulative or substitutionary? The rule which applies to legacies applies also to appointments of personalty, viz.: that successive appointments are cumulative, unless a contrary intention be shewn. But it would be impossible to carry out the appointments made by the deed-poll, unless they be held to be in substitution for the previous appointments.

It is not necessary to call in the doctrine of double portions; if it were, the rule would apply: *Peachey* on Settlements (3).

Again, the doctrine of election would apply, if necessary. Whenever a donor gives away another person's property, and gives to that person a benefit by the same instrument, that person must elect. Here he has given away one-sixth of the fund by the deed-poll to *Yorke Dancer*; that cannot be carried out if the previous appointments stand; and Mrs. *Lavers* and Mrs. *England* must therefore elect.

Mr. *E. F. Smith*, Q.C., for the representatives of *Amelia Dancer*, claimed a share for her; and also, for the trustees of Mrs. *Pattison's* marriage settlement, claimed to be entitled to what was not disposed of by the deed-poll of 1850. It was obviously the intention of Mr. *Dancer* to make a provision for Mrs. *Pattison* and her children. As Mrs. *Pattison* was dead at the date of the deed-poll, and the settlement contained no power to appoint to issue of a deceased child, the only way of providing for such issue was to leave a share unappointed, and release the power of appointment as to it.

(1) 2 Ves. 336. (2) 1 J. & H. 470. (3) Page 492.

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The words "irrevocably direct," and the direction that one-fifth of the share given to *Edward Cussans Dancer*, should, in the event of his death, be held upon the trusts "then" subsisting under the marriage settlement, shewed that the deed-poll is equivalent to a release of the power of appointment.

Mr. *Roxburgh*, for the son of Mrs. *Pattison*.

LORD ROMILLY, M.R.:—

My opinion is, that the deed-poll is in substitution for the former appointments. Of course the donee of the power could not interfere with these; but I think that when he executed the deed-poll, he meant to give to each of his daughters one-sixth of the fund, not in addition to the one-seventh he had already given them, but in substitution for it. This would raise a question as to election; but there is no doubt which way the election would be, and therefore it is sufficient to say that these appointments are substitutionary. I also think that *Amelia Dancer* is entitled to one-sixth of the funds, and to a fifth of another sixth; and that the will takes effect and operates as an appointment of so much of the fund as was not appointed by the deed-poll.

Solicitors: Mr. *Kearsey;* Messrs. *Vizard, Crowder, Anstie, & Young.*

In re CROOKHAVEN MINING COMPANY.

M. R. 1866 Nov. 3.

Company—Voluntary Winding-up—Dissolution—Jurisdiction—Companies Act, 1862, *ss.* 142, 143.

The Court has jurisdiction to make an order in the matter of the voluntary winding up of a company under the *Companies Act*, 1862, after the expiration of three months from the date of the registration of a return by the liquidators of a meeting having been held in pursuance of the 142nd section of the Act, if the application for such order is made before the expiration of the three months:

Semble, the dissolution of a company under the 143rd section does not deprive the Court of its jurisdiction over such company under the Act.

THIS was a Petition by *Richard Bush*, the holder of 500 fully paid-up shares in the *Crookhaven Mining Company, Limited*, and

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one of the liquidators under the voluntary winding up of the company, praying that the Petitioner and the other holders of paid-up shares might be declared entitled to be repaid the difference between the amount paid up by the holders of ordinary shares and the full amount of the paid-up shares, and to have a call made upon the holders of ordinary shares for that purpose, and that the other liquidators might be ordered to concur with the Petitioner in making such call, and to apply the proceeds in adjusting the rights of the contributories accordingly.

The company was formed and registered under the *Joint Stock Companies Acts*, 1856 and 1857, on the 26th of August, 1859. Its nominal capital was £20,000, divided into 8000 shares of £2 10*s.* each. It purchased a mine for £4850, of which £850 was paid in money, and £4000 in shares, credited as fully paid up. The Petitioner had purchased 500 of these shares. Calls had been made on the ordinary shares, from time to time, to the amount of £1 17*s.* per share, some of which remained unpaid.

In February, 1864, the company resolved upon a voluntary winding-up, and the Petitioner and two other persons were appointed liquidators.

The liquidators, having realized the assets and discharged the liabilities of the company, called a general meeting of the company, in pursuance of the 142nd section of the *Companies Act*, 1862, to be held on the 15th of May, 1866, for the purpose of having the accounts laid before them, with a view to the dissolution of the company.

Before the meeting took place, the Petitioner requested his co-liquidators to make a call on the ordinary shares of the company, for the purpose of recouping the holders of fully paid-up shares the excess credited as paid upon their shares over the amount paid for calls on the ordinary shares, and on the 8th of May he wrote them a letter calling their attention to the case of *In re Anglesea Colliery Company* (1), and requiring them to postpone the meeting until the rights of the contributories *inter se* had been adjusted.

On the 15th of May the meeting was held, and resolutions were passed approving the proceedings and accounts of the liquidators, and declaring the company to be dissolved.

(1) Law Rep. 2 Eq. 379. 12 Jur. N.S. 498

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The liquidators, in pursuance of the 143rd section of the *Companies Act*, 1862, made a return to the Registrar of Joint Stock Companies of the meeting having been held, and the return was registered on the 4th of June.

On the 6th of August the Petitioner again wrote to the other liquidators, requiring them to take the necessary steps for adjusting the rights of the contributories in accordance with the decision in *In re Anglesea Colliery Company*, which had been affirmed, on the 4th of August, by the Lords Justices (1); and on their refusal to make any further call, he presented this Petition on the 31st of August (2).

Mr. *Cracknall*, for the Petitioner:—

The right of the holders of paid-up shares to have contribution from the holders of shares not fully paid up is established by *In re Anglesea Colliery Company*, but it is said that no call can now be made, inasmuch as by the 143rd section of the *Companies Act*, 1862, the company is to be deemed to be dissolved at the expiration of three months from the date of the registration of the return of a meeting having been held in pursuance of the 142nd section. But the meeting of the 15th of May having been called before the rights of the contributories had been adjusted, and consequently

(1) Law Rep. 1 Ch. 555. 12 Jur. N.S. 696

(2) The 142nd and 143rd sections of the *Companies Act*, 1862, are as follows:—

"142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account shewing the manner in which such winding-up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them, and hearing any explanation that may be given by the liquidators. The meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in *England* in the *London Gazette*, and as respects companies registered in *Scotland* in the *Edinburgh Gazette*, and as respects companies registered in *Ireland* in the *Dublin Gazette*.

"143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved: if the liquidators make default in making such return to the registrar, they shall incur a penalty not exceeding £5 for every day during which such default continues."

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before the affairs of the company had been fully wound up, was not such a meeting as was intended by the 142nd section; if it were so, the liquidators might call a meeting before the debts of a company have been paid; and the creditors, after the expiration of the three months, would be deprived of all relief against the company under the Act. In this case, moreover, the Petition having been presented before the expiration of the three months, the jurisdiction of the Court could not be taken away by the subsequent constructive dissolution of the company.

Mr. *Hemming*, for one of the liquidators:—

The liquidators issued the notice for the meeting before they were asked to make a call for the purpose of adjusting the rights of the contributories; they had no power to withdraw the notice, and the holding of the meeting, the return to the registrar, the registration of the return, and the dissolution of the company at the expiration of three months, were necessary consequences of the notice. The company has ceased to exist, and, whatever may be the rights of the holders of paid-up shares against the other shareholders, those rights must be enforced in some other manner, the jurisdiction of the Court, under the *Companies Act*, having come to an end. At the time when the meeting was called, it was generally supposed that fully paid-up shareholders had no right to contribution, and it would be contrary to the practice of the Court to give to the subsequent decision of *In re Anglesea Colliery Company* (1) the retrospective effect of invalidating the dissolution of this company.

Lord Romilly, M.R.:—

At the time when this Petition was presented, the Court unquestionably had jurisdiction, under the *Companies Act*, to order the call to be made, and I am of opinion that the delay in the hearing of the Petition, caused by the intervention of the Long Vacation, cannot affect the rights of the Petitioner, and that he is entitled to stand in the same position as if the Petition had been heard before the expiration of three months from the 4th of June. That being so, it is unnecessary that I should go into the

(1) Law Rep. 2 Eq. 379; 1 Ch. 555. 15 Jur. N.S. 490, 696

question whether the 143rd section of the statute deprives the Court of its jurisdiction over a company which, under the provisions of that section, is deemed to be dissolved; I am inclined to think that it was not the intention of the Legislature, by any provision of this statute—which was intended to provide a less expensive and more speedy and direct method of winding up companies—to fetter the jurisdiction of the Court, and compel parties to resort to more circuitous and expensive remedies. There must be an order for a call upon the holders of shares not fully paid up, for the purpose of adjusting the rights of the shareholders; and as this was a very proper question to be raised, both the Petitioner and the Respondent must have their costs out of the money to be raised by the call.

Solicitor for the Petitioner: Mr. *Billing.*
Solicitor for the Respondent: Mr. *James Bell.*

V.-C. S.
1866
Nov. 15.

In re SABLONIÈRE HOTEL COMPANY.

Voluntary Winding-up—Judgment Creditor—Execution—Injunction.

A creditor who commenced an action, and signed judgment after a resolution (of which he had notice) passed and duly confirmed to wind up voluntarily a limited company, restrained from issuing execution.

2 Ch 462.
5 Eq 70

THE *Sablonière Hotel Company, Limited,* was incorporated and registered on the 26th of March, 1864, with a nominal capital of £100,000, divided into 5000 £20 shares, of which about 1912 shares were allotted, and £4 paid on each.

On the 13th of August, 1865, a special resolution was duly passed for a voluntary winding-up of the company, and on the same occasion *J. H. Doyle* was appointed liquidator.

On the 28th of August, 1865, the resolution was duly confirmed.

On the same day, *i.e.*, the 28th of August, 1865, one *J. J. Orgil,* a creditor (and also a shareholder, with notice of the resolution) commenced an action in the Court of Exchequer against the company to recover his debt.

The company did not appear to the action, and, on the 5th of September, 1866, the Plaintiff signed judgment for want of appearance.

The Plaintiff having threatened to issue execution on the judgment, the liquidator now moved, on notice, to restrain him.

Mr. *Ramadge,* for the motion :—

The principle of the 133rd section of the *Companies Act,* 1862, is, that the assets of a company shall be equally distributed among its creditors; but that principle cannot be maintained if, after a company has resolved to wind up, one creditor is to be at liberty to seize the whole, or the greater part, of the assets, so as to deprive the other creditors of their proportion. Accordingly, in several cases, the Court has restrained creditors who attempted to secure this advantage to themselves, to the prejudice of the other creditors.

In the case of *In re Keynsham Company* (1), where a creditor commenced an action *after* a resolution to wind up voluntarily, the Court restrained the action on the terms that the creditor should have access to the proceedings, and be paid his costs of the action.

In the case of *In re Life Association of England* (2), the action was commenced *before* the resolutions to wind up the company, but the Court restrained it on the ground that there is an analogy between a voluntary winding-up and an administration suit; and the Court directed the creditor's costs to be added to his debt.

In the case of *In re Waterloo Life, &c., Insurance Company* (3), the creditor had obtained judgment on the day the winding-up order was made, and placed a *fi. fa.* in the sheriff's hands, but the Court, nevertheless, restrained the execution on the application of the liquidators.

On these grounds the company is entitled to the injunction.

Mr. *E. K. Karslake*, for the creditor:—

The distinction is between cases where the creditor has obtained judgment, and cases where the action is still undecided.

None of the cases cited have any application to this case. In the cases of *In re Keynsham Company*, and of *In re Life Association of England*, the creditors had obtained no judgments, and the validity of their claims remained undecided. In the case of *In re Waterloo Life, &c., Insurance Company*, a judgment had been obtained, but the company was being wound up by the Court, and was, therefore, dealt with on a principle totally different from that on which the Court acts with regard to a voluntary winding-up.

The leading case, which settled the practice, is that of *In re Great Ship Company* (4), decided by the Lords Justices on appeal from the Rolls. In that case the creditor, eight days before the Petition to wind up, seized the goods of the company in execution, and the Master of the Rolls restrained the execution; but, on appeal, the Court dissolved the injunction, on the ground that the creditor ought not to be deprived of the fruits of his judgment.

(1) 33 Beav. 123; 9 Jur. (N. S.) 885.
(2) 10 Jur. (N. S.) 762.
(3) 31 Beav. 589.
(4) 10 Jur. (N. S.) 3.

V.-C. S. 1866 *In re* Sablonière Hotel Company.

In the case of *In re Exhall Mining Company* (1), where the landlord distrained on the goods of the company for rent, the Court allowed the sale to proceed.

On these authorities, it is submitted that the creditor is entitled to issue execution.

Sir John Stuart, V.C.:—

There can be no doubt that the Court has jurisdiction to grant this injunction; but the only question is, whether, having regard to the fact that this is only a voluntary winding-up, the Court will, in its discretion, interfere.

By the 133rd section of the *Companies Act*, 1862, the Legislature declares that the effect of a resolution to wind up a company voluntarily shall be, that all the creditors shall be paid *pari passu*. Therefore, after the resolution is passed and confirmed, each of the creditors is entitled to a proportionate share of the assets. But to allow one creditor to seize the whole, or an undue share, of the assets of the company for his own benefit, would be, in effect, to render nugatory the provisions of the statute. The execution must, therefore, be restrained. The case of *In re Keynsham Company* (2) is a clear authority in point.

The company, by their officer, might have applied earlier to the Court, and have avoided some expense, but their not having done so is no reason for allowing the action to proceed.

There must, therefore, be an injunction, but without costs, as no execution was, in fact, issued.

Solicitors for the Liquidator: Messrs. *Norris & Sons.*
Solicitors for the Creditor: Messrs. *Mackeson & Goldring.*

(1) 10 Jur. (N. S.) 576.

(2) 33 Beav. 123.

In re JOINT STOCK DISCOUNT COMPANY.

M. R.
1866
Dec. 8, 10.

NATION'S CASE.

Company—Contributory—Transfer of Shares—Registration—Unnecessary Delay—Companies Act, 1862, *s.* 35.

A transfer of shares in a company was executed by both parties, left at the office for registration, and approved by the director whose duty it was to inspect transfers, on the 28th of February, 1866, and would, according to the ordinary practice of the company, have been confirmed at the next meeting of the directors, which was held on the 1st of March, and registered; the directors did not confirm it at that meeting, and, on the 3rd of March, the company being insolvent, they resolved that no transfers then in the office should be registered without their express sanction; the transfer was not registered, and the company was soon afterwards ordered to be wound up:—

Held, that as the transfer was not registered on the 1st of March, there was unnecessary delay in registering it within the meaning of the 35th section of the *Companies Act*, 1862; that the resolution of the 3rd of March could not affect a transfer which ought to have been previously registered; and that the transferor was entitled to be in the same position as if the transfer had been registered on the 1st of March, and could not be placed on the list of contributories. *Shepherd's Case* (1) distinguished.

THIS was an application by *Richard Nation*, that the list of contributories of the *Joint Stock Discount Company Limited*, might be varied by excluding his name therefrom, and substituting the name of *Alexander Thomas Binney*.

The articles of association of the company contained the following clauses:—

"8. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

"10. The company may decline to register any transfer of shares made by any member who is indebted to them for any money then due, or who may be solely or jointly liable to them for any call or interest thereon, or in respect of any bill, note, security,

(1) Law Rep. 2 Eq. 564; 2 Ch. 16.

M. R. 1866 NATION'S CASE.

or advance, notwithstanding the same may not be then due, or in any case where the directors consider the transferee to be an irresponsible person, or that the transfer is made for purposes not conducive to the interests of the company.

"14. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit."

In August, 1863, the directors passed a resolution, "that in future one director may approve and pass transfers."

The ordinary practice of the company as to the registration of transfers was as follows:—Within a week or ten days after the transfer, duly executed, was lodged at the office, the transfer clerk entered it in a book, called the register of transfers, and marked the share certificate of the transferor as "cancelled," and prepared a new certificate in the name of the transferee; then the director, whose turn it was to inspect transfers, inspected the transfer, and if he approved of it, signed his initials to the entry in the register of transfers, and signed the new certificate, and sealed it with the seal of the company. At the next board meeting the passing of the transfer by the inspecting director was laid before the directors, and confirmed, and thereupon the certificate was issued to the transferee, and his name was entered in the register of shareholders as the holder of the shares.

On the 31st of January, 1866, the applicant, who was the registered holder of fifty shares, sold them to *Binney;* the deed of transfer was executed by both parties on the 14th of February, and was lodged at the office for registration on the 17th, the applicant having previously paid all calls on the shares, and not being indebted or liable to the company in any way; the transfer was entered in the register of transfers, the old certificate was marked as cancelled, and on the 27th of February the inspecting-director for the day initialled the entry, and signed and sealed a certificate in the name of *Binney.*

On the 28th of February, in consequence of a resolution passed at a general meeting of the company, nearly all the directors resigned office, and new directors were elected.

On the 1st of March an ordinary meeting of directors was held, but no transfers were brought before the directors at that meeting.

On the 3rd of March a special meeting of the directors was held, at which the following resolution was passed:—"That no transfers of shares now in the office be registered without the express sanction of the board, except transfers to the new directors." On the 5th of March another special meeting was held, at which it was resolved that a Petition should be presented for the winding-up of the company, and that the register of transfers, the register of shareholders, and all transfers then in the office, should be sealed up by the directors.

On the 7th of March the Petition was presented, and on the 17th the winding-up order was made.

Under these circumstances the name of the applicant had been placed on the list of contributories as the holder of fifty shares.

Binney had been served with notice of the present application, but did not appear.

Mr. *Southgate*, Q.C., and Mr. *T. Stevens*, for the Applicant:—

The applicant ceased to be a shareholder when the entry of the transfer in the register of transfers was signed by the inspecting director. The 25th section of the *Companies Act*, 1862, requires a register of members of a company to be kept in one or more books, and in this case the register of transfers and the register of shareholders together constitute the register book of the company, and the entry of the name of a transferee in either of them satisfies the 8th clause of the articles.

But, assuming that it was necessary that the name of the transferee should be entered in the register of shareholders, in order that the transferor should cease to be a shareholder, the fact that it was not so entered was solely due to unnecessary delay on the part of the company; the applicant therefore would have been entitled, if the company had gone on, to have his name removed from the register under the 35th section of the Act, and he ought not to be placed on the list of contributories. This case is quite distinct from *Shepherd's Case* (1). In that case the decision of the Lord Justices proceeded on the ground that the transfer was not left for registration until the 3rd of March, so that, according to the ordinary practice of the company, it would not have been

(1) Law Rep. 2 Eq. 564; 2 Ch. 16.

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registered until after the 7th of March, when the winding-up commenced; but here there was no delay on the part of the transferor or transferee; the transfer was actually passed by the inspecting director on the 27th of February, and all that remained to be done was the formal confirmation by the board, which would have been given in ordinary course at their meeting on the 1st of March, and the entry in the register, which would have followed as a matter of course. Nor does the decision of this Court in *Shepherd's Case*, in favour of the validity of the resolution of the directors of the 3rd of March (as to which the Lords Justices expressed no opinion), affect the present case, in which, but for the unnecessary delay of the directors, the transfer would have been completely registered before that resolution was passed.

Mr. *Jessel*, Q.C., and Mr. *Roxburgh*, for the Official Liquidator:—

By the 8th clause of the articles of association, the applicant has contracted to remain a shareholder until the name of the transferee of his shares is entered in the register book, that is to say, in the register of shareholders. That name has not been so entered, and, according to the decision of the Lords Justices in *Shepherd's Case* (1), the applicant is still a shareholder, unless he can shew that default was made or unnecessary delay took place on the part of the company in entering it. It follows from the decision of this Court in the same case (2), that it could not have been entered after the resolution of the 3rd of March, so that the only question is whether unnecessary delay took place before that day. Now the only meeting of the directors, at which the transfer could have been confirmed, was that held on the 1st of March, the very next day after the new board of directors had been appointed, and it cannot be said that they were guilty of default or unnecessary delay in not immediately considering the question of transfers. Two days afterwards they did consider it, and passed the resolution, which the Court has held that they were justified in passing, having regard to the insolvent state of the company, and it may fairly be assumed that, if the matter had been brought before them on the 1st of March, they would then have passed the same resolution, and refused to confirm and register the transfer.

(1) Law Rep. 2 Ch. 16. (2) Law Rep. 2 Eq. 564.

LORD ROMILLY, M.R.:—

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I am of opinion that in this case there was unnecessary delay, and that this case is not determined by my decision in *Shepherd's Case* (1), in the way in which I intended to decide that case, and in the way in which I understood it. Now, unquestionably it is a matter of considerable importance to understand what is meant by the words "unnecessary delay" in the Act. In my opinion, when everything is ripe for the transfer, and the company is going on in a flourishing condition (I will presently refer to the difference that exists in this case), as, for instance, where, as in this case, the transfer clerk has entered the transfer in the book, and the inspecting director has seen the entry, and, seeing that it is all right, has put his initials against it, and there is a meeting of the directors, at which, in the ordinary course of business, the transfer would be confirmed, if that transfer is not confirmed upon that occasion, there is unnecessary delay. I do not know in what other way to define the words "unnecessary delay." If it is not to be done on the first occasion, when in the ordinary course of business it ought to be done, when is it to be done? If the delay of one meeting is not unnecessary, why is the delay of two, or three, or four, or any number, unnecessary? Unless there is some sufficient reason to induce the directors to delay the confirmation of the transfer (I am now considering the question upon the assumption that the company is flourishing, and going on in the ordinary way), then, in my opinion, the omission to confirm it on the day when, according to the ordinary course of business, it ought to have been confirmed, is unnecessary delay, and if any question arises by reason of that delay, the transferor and transferee should be considered as having had the transfer completed upon that day.

And now I will proceed to consider this particular question. I fully admit, and in fact that was what I intended to decide in *Shepherd's Case* (1), that if a company find they are in a situation in which they cannot go on, if they are of opinion, after a proper investigation of the state of their affairs, that it is necessary to wind up, and that it is but fair to all the persons connected with the company that matters should remain *in statu quo*, then they

(1) Law Rep. 2 Eq. 564; 2 Ch. 16.

M. R. 1836 NATION'S CASE.

may come to a resolution that they will allow no transfers to be registered after that date, but it is always subject to this, that those transfers which they ought to have registered previously to the date of the resolution cannot in any degree be affected by it; but all those which they were not bound to register before that time, those they are entitled to say shall not be registered after that time; and, accordingly, in *Shepherd's Case* (1), where the transfer had only been deposited on the 3rd of March, the very day on which the resolution was passed, so that the directors were not bound to register it, and could not have registered it, before that day, they were justified in suspending its registration from that period. The question is whether, in the present case, they were justified in suspending the registration of the transfer on the 1st of March. I find that everything was prepared and ready for the transfer to be approved on the 27th of February; the transfer was entered in the book, duly initialled by the inspecting-director, and everything was ready for the first meeting; that meeting was held on the 1st of March; there was no discussion about the registration of transfers, but the ordinary business of the company was carried on. It is true that the company was in a very distressed state, because it appears from the minutes of the meeting that there were bills to the amount of £25,000 to be paid, and that the bankers would not advance the money for that purpose, and, after a great deal of trouble, by means of certain loans and the assistance of Messrs. *Overend, Gurney, & Company*, who found £12,000, the money was got at last, and the business went on. But the difficulty I feel is this: How do I know that the company was insolvent on that day? How can I say that the directors ought to have come to a conclusion on that day that no further transfers of shares should be registered? What *data* has the Court to proceed upon in the matter? How can the Court usefully engage itself in an inquiry as to the greater or less insolvency of the company on a particular day? They had called up half the amount of the shares; if the other half had been called up, is it possible to say that the company might not have gone on successfully? No doubt when the directors themselves, after investigation, *bonâ fide* say that such is the state of the company that from that

(1) Law Rep. 2 Eq. 564; 2 Ch. 16.

day they will not register any more transfers, then the Court has something intelligible to go upon; but how can the Court go back into a previous investigation, and say they ought to have suspended the transfer of the shares on the previous occasion? How far is it to go back? For anything I know, it might have to go back for several months; there appears to have been a great number of transfers in the office which had not been attended to previously to this time. I am of opinion that the Court would be engaging in a very expensive and uncertain inquiry if it were to go back to know whether, on the 1st of March, the state of the company was such that the directors ought to have passed, though they did not pass, a resolution that no more transfers should be registered, or that the registration should be delayed until a subsequent period for the purpose of ascertaining whether the company could go on or not. I am of opinion, therefore, and that is what I meant to decide in *Shepherd's Case*, that it was when the resolution was passed that the line was drawn, and that the resolution affected all those transfers, and only those transfers, which the directors had not been previously bound to register, according to the ordinary course of business, without any improper delay. I am of opinion, therefore, that Mr. *Nation's* name must be taken off the list of contributories, and treated as if it had been off the register on the 1st of March. It was a very proper case to bring before the Court, and the costs of both parties must come out of the estate.

Solicitor for the Applicant: Mr. *R. Nation.*

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

M. R.

1866

Nov. 26;
Dec. 10.

In re CONTRACT CORPORATION.

HEAD'S CASE.
WHITE'S CASE.

Companies Act, 1862, s. 35—*Winding-up—Contributory—Vendor of Shares—Register—Unregistered Transfer.*

The registered owner of certain shares in a company executed a transfer of them to a purchaser two years before the date of a winding-up order; but took no steps to procure the transfer to be registered; a winding-up order having been made:—

Held, that his name could not be removed from the register under s. 35 of the *Companies Act*, 1862, or from the list of contributories.

Ward's Case (1), explained.

2 Ch 431-4, 5
443.
5 Eq 199
206
24 BD 266

Nov. 26. HEAD'S CASE.

In December, 1864, Mr. *Head*, who was the registered owner of fifteen shares in the *Contract Corporation Limited*, sold eight of them to Mr. *Cox*, one of a firm of solicitors in *Bristol*, who were the *Bristol* solicitors of the company. On the 14th of December, 1864, Mr. *Head* executed a transfer of the shares to Mr. *Cox*. No application was ever made to the company for the registration of this transfer; and Mr. *Head's* name remained on the register of shareholders in April, 1866, when an order was made for winding up the company.

The 10th clause of the articles of association of the company provided that the transferor of shares should be deemed to remain the holder of such shares until the name of the transferee was entered on the register in respect thereof; and the 12th clause, that the company might decline to register any transfer of shares made by any member who might be indebted, or otherwise liable to the company, or in any case where the directors considered the transferee to be an irresponsible person.

Mr. *Head* having been put on the list of contributories, now applied by summons, under sect. 35 of the *Companies Act*, 1862, that Mr. *Cox's* name might be placed on the register of shareholders in place of his own.

Mr. *Cox* was served with the summons, but did not appear.

(1) Law Rep. 2 Eq. 226.

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HEAD'S CASE.

Mr. *Baggallay*, Q.C., and Mr. *Young*, for *Head* :—

It was the duty of the purchaser to register the transfer: *Walker* v. *Bartlett* (1); he must, therefore, be put on the list of contributories.

Further, the company must be taken to have had notice of the transfer, inasmuch as the transferee was their own solicitor: *Prosser* v. *Rice* (2); *Bury* v. *Bury* (3).

Mr. *Selwyn*, Q.C. (Mr. *Swanston* with him), for the official liquidator:—

It is quite indifferent to the official liquidator, so far as regards this particular case, whether Mr. *Head* or Mr. *Cox* is put on the list; but, as a matter of law, I submit that Mr. *Head* is the proper person to be contributory. The case is governed by the principle of *Shepherd's Case* (4); and Mr. *Head's* remedy is by a bill against Mr. *Cox* for indemnity: *Walker's Case* (5).

Mr. *Baggallay*, in reply:—

Walker's Case has no application here, for in that case the transfer was made subsequently to the winding-up order.

LORD ROMILLY, M.R.:—

I have always held in these cases, where a contract has been entered into for the sale of shares to a person, the remedy is against him; but if you have not taken the proper steps to get his name put on the list of shareholders, your name must remain on the list. Here you have taken no such steps, and you have not given the directors the means of exercising any discretion or judgment on the subject. Now I assume that you are entitled, as against Mr. *Cox*, to have a decree in the nature of specific performance; that is to say, that he must indemnify you against all the consequences of his not having performed the contract which you were entitled to compel him to perform; but I do not see how you can come here and say you are not to be put on the list of shareholders, having taken no step whatever to compel him to carry it into execution.

(1) 18 C. B. 845; 2 Jur. N.S. 643.
(2) 28 Beav. 68.
(3) Sugd. V. & P. 11th ed. App.
(4) Law Rep. 2 Eq. 564; 2 Ch. 16.
(5) Law Rep. 2 Eq. 554.

M. R. *Dec.* 10. WHITE'S CASE.

1866

WHITE'S CASE.

2 Ch 434-4 -5, 443 5 Eq 206

IN December, 1863, *White* being the registered owner of certain shares in the company, instructed his broker to sell them; and they were accordingly sold to one *Symons*. In March, 1864, *White* executed a transfer to *Symons*. No application was ever made to the company for the registration of the transfer, and *White's* name remained on the register of shareholders at the date of the winding-up order; and he had been put on the list of contributories.

White now applied by summons, under sect. 35 of the *Companies Act*, 1862, that *Symons'* name might be substituted for his on the register of shareholders.

Mr. *Jessel*, Q.C., and Mr. *Caldecott*, for the applicant:—

This case is governed by *Ward's Case* (1); for *Symons* is undeniably the owner of the shares in equity, and as such ought to be put on the register. *Head's Case*, which is inconsistent with *Ward's Case*, must be taken to have been decided on the ground that the transferee did not appear.

The only grounds on which the company could have refused to register the transfer were, either that *White* was indebted to the company, or that *Symons* was an irresponsible person. There is not even an allegation that such was the case.

Mr. *Selwyn*, Q.C., and Mr. *Swanston*, for the official liquidator, and

Mr. *E. Cutler*, for *Symons*, were not called upon.

LORD ROMILLY, M.R.:—

It is important that I should make a few remarks to explain the grounds of my decision upon this subject, the more so, because it appears to me that both *Ward's Case* and *Head's Case* have been misunderstood.

I held, under the 35th section of the *Companies Act*, 1862, that

(1) Law Rep. 2 Eq. 226.

the Court, in proceeding to decide the title in such a question, would be, in point of fact, deciding an action at law, or a suit in equity; and this case has been argued as if the sole question here was one to be determined between Mr. *White* on the one side, and Mr. *Symons* on the other. If a bill were filed for specific performance, unquestionably those would be the only two persons concerned, and, whatever might be the state of the register, the Court would compel the person who was in the wrong to make compensation to, or to indemnify the other. But the moment you come to deal with the register there is a third element to be considered, which is a very important one, and which the Court must always bear in mind, which is, its relation to the company itself, and the shareholders of the company. Though the Court may see its way as between *A.* and *B.* to decree specific performance of a transfer of shares, yet it may say, as regards the shareholders themselves, it would be inequitable and improper to make that alteration in the list of the shareholders. That is a material distinction between those two cases, and I intended in *Ward's Case* and *Head's Case* to call attention to the circumstance, that you must take into consideration in addition to the rights between the two parties, how you are affecting the particular status of the various shareholders in the company.

Now *Ward's Case* I understand to be this. A man sells his shares to a person of the name of *Stafford*, and thereupon he executes a transfer to *Stafford*, and then he finds there is some agreement between *Stafford* and *Henry*, by which *Henry* is to have the benefit of the contract. *Henry* applies to him for that purpose, upon which the vendor, *Ward*, says, "I am quite willing to make the transfer to you, but as you are not the purchaser, you must obtain for me the consent of the purchaser, or indemnify me against his acts." Upon the latter being done he makes the transfer to *Henry*, and the transfer is deposited with the company, and the transfer would have been registered had not the purchaser, *Stafford*, given notice, and said, there was no contract which could be enforced between *Henry* and him, and that he did not choose that the transfer should be registered. What is the vendor, *Ward*, to do? What step could he take? He could do nothing until the contract was executed. He was quite willing that either should

M. R. 1866 WHITE'S CASE.

take the shares. He was quite ready that the transfer should be made to either, if the company would allow it: and the company were quite willing to allow the transfer if either of them would consent to take it. Then *Stafford* and *Henry* quarrel, and there is a suit instituted. The vendor could do nothing. He could not apply to the company to remove his name from the register; he could not apply to this Court for directions to have it done until the disputes were settled. Therefore, he ought not to be in a worse situation by reason of the contest between *Henry* and *Stafford*. He has done no harm to the shareholders, because it is not his default that the register is not altered.

But take *Head's Case*, or this case; then the state of matters appears to be quite different. Here the transfer takes place in March, 1864, and the winding-up order was not made till 1866, and there is no quarrel. There is nothing to stop the registration of the transfer. Why does not the vendor compel the purchaser to register the shares? He could have done so; but he has taken no step for that purpose: and assuming that the purchaser is bound to make good to him the price of the shares, and to indemnify him from all the consequences, that is relief to be sought in a suit between those two persons. But in the case before me, I have to regard the rights and condition of the shareholders themselves. How are the shareholders of the company affected? They say, "You were bound to let us know what was the state of the company at the earliest period, and as you have not thought fit to do so, but have held your peace for a period of two years, and done nothing whatever, you cannot complain now; and we insist upon having you on the list of shareholders, you not having taken any step to enforce your right to get the transfer made."

I am of opinion that the Chief Clerk is right, and that Mr. *White* must remain on the list of contributories.

Solicitor for Mr. *Head:* Mr. *A. J. Head.*
Solicitors for Mr. *White:* Messrs. *Edwards, Webb, & Co.*
Solicitors for Mr. *Symons:* Messrs. *J., T. & R. Gole.*
Solicitors for the Official Liquidator: Messrs. *Linklaters & Co.*

IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* WHITHAM.

M. R.
1866
Nov. 15.

Practice—Corporation Plaintiff—Interrogatories for Examination of Officers— 15 & 16 *Vict. c.* 86, *s.* 19.

Where a company or corporation is Plaintiff in a suit, the Defendant cannot, under s. 19 of 15 & 16 Vict. c. 86, file interrogatories for the examination of its officers, when they are not parties to the suit.

IN this case an order had been obtained by the Defendants, on an *ex parte* application, giving them leave to file interrogatories for the examination of the chairman and manager of the above company, who were not parties to the suit. The company was in course of liquidation, under a voluntary winding-up. The object of the present motion was that the interrogatories might be taken off the file.

Mr. *Cole*, Q.C., and Mr. *Fry*, for the company, in support of the motion :—

The 19th section of the 15 & 16 Vict. c. 86, by which the Defendant in a suit may file interrogatories for the examination of the Plaintiff without filing any cross bill of discovery, does not apply to the case where a corporation or company is Plaintiff, and discovery is wanted from any of the officers who are not parties to the suit. Here a company, which is in the course of winding-up, finds that the proceedings of a suit are interrupted by interrogatories filed for the examination of its former officers,—a proceeding wholly irregular, and not warranted by the language of the section. It is still open to the Defendants, if they desire to interrogate the chairman and manager, to file a cross bill for that purpose.

Mr. *Selwyn*, Q.C., and Mr. *Bagshawe*, for the Defendants :—

The Defendants desire to obtain information as to matters which occurred while these gentlemen occupied the positions of chairman and manager of the company. We submit that they are entitled to do so by filing interrogatories, and without taking the step of filing a cross bill for the purpose of discovery. The 19th section

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of the Act applies to the case of a corporation Plaintiff; if so, it must extend to the officers of a corporation. This section must be construed with reference to the former rules and practice of the Court. The right to bring the officers of a corporation before the Court is incident to the right of taking proceedings against a corporation; and as this section would be nugatory in the case of a corporation Plaintiff if it did not include the right of examining its officers, it must be taken to include them. In the analogous case of taking out a summons as to documents, an order would be made against a company to obtain discovery from itself and its officers, and in this case, as there would be difficulty in obtaining from the company an answer to interrogatories, they may be properly filed against those officers from whom the information can be obtained. The former order was regular, and ought not to be discharged.

LORD ROMILLY, M.R.:—

It is clear that the case of the officers of a company or corporation is not within the terms of the 19th section of the Act, for if it had been intended to apply to them in the case of a corporation being Plaintiff, they would have been expressly mentioned. That is not the case, therefore the chairman and manager cannot be compelled to answer the interrogatories. I am of opinion that the case is one in which it would have been proper not to have put the parties to the expense of filing a cross bill, and therefore I will direct the interrogatories to be taken off the file, but will give no costs.

Solicitors for the Plaintiff: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Defendants: Messrs. *Few & Co.*, agents for Messrs. *England & Co., Hull.*

NEAME *v.* MOORSOM.

M. R.
1866
Nov. 9, 10.

*Land Tax—Redemption—*38 *Geo.* 3, *c.* 60, *ss.* 17, 37*—Charge on Leaseholds—Settlement—General Words—Laches.*

C., the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under 38 Geo. 3, c. 60, and transferred to the commissioners a sum of consols for that purpose, but did not exercise the option under sect. 17 of the Act. After the death of *C.*, *T. D.* and *M. D.*, who were entitled in equal shares to the leaseholds under his will (which contained no reference to the land tax), and also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds, and all their "estate and interest" therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land-tax. *T. D.* died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of *M. D.*, the personal representative of *T. D.* and *M. D.* claimed, as against those entitled under the settlement, a charge in respect of the land tax:—

Held, that *C.*, on redeeming the land tax, became entitled to the interest on the consols transferred by him as a rent charge on the leaseholds for his own benefit; that it did not pass under the general words of the settlement of 1818, but remained as a separate property in the settlors, as residuary legatees of *C.*; that their representative was now entitled to it as a charge on the leaseholds; and that the fact of *T. D.* not having made any claim was no bar.

HENRY COLLARD was entitled as lessee, under three leases from the Archbishop of *Canterbury*, to certain lands for terms of twenty-one years, renewable by custom every seven years, subject to land tax: the sum of £10 8*s.* was charged on the land comprised in two of the leases, and £10 16*s.* on that comprised in the third lease.

In December, 1798, *Collard* contracted under the Act of 38 Geo. 3, c. 60 (which was repealed in 1802, by the 42 Geo. 3, c. 116), to redeem the land tax on the land comprised in the three leases in consideration of the transfer of £777 6*s.* 8*d.* consols, which he afterwards transferred to the commissioners, and the land became exonerated as from the 25th of May, 1799, but he did not, by the contract or otherwise, exercise the option given to him by the 17th and 37th sections of the Act.

In 1809 *Collard* died, having by his will bequeathed the leaseholds to his granddaughters, *Mary Denne*, and *Jane Denne* (then infants), equally, and bequeathed to them the residue of his

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personal estate in equal shares, but the will contained no reference to the redeemed land tax.

The leases were renewed by *Collard* himself in 1804 for new terms of twenty-one years, and in like manner by his executors after his death in 1811 and 1818.

The two moieties of the leasehold property were assigned by the executors to *Mary Denne* and *Jane Denne* on their attaining twenty-one. In 1817 *Jane Denne* died, and her father, *Thomas Denne*, took out administration to her.

By an indenture of the 17th of July, 1818, made on the marriage of *John Hilton* and *Mary Denne*, after reciting the three leases, and reciting that it was agreed that the pieces of land and other the premises comprised in the leases should be assigned to the trustees upon the trusts of the settlement, *Thomas Denne* and *Mary Denne* thereby assigned the pieces or parcels of land, and other the premises comprised in the several leases, "and all the estate, right, title, interest, terms, trust, possession, property, possibility, claim, and demand, whatsoever, both at law and in equity, of the said *Thomas Denne* and *Mary Denne*, of, in, to, or out of the same premises," to the trustees therein named, upon trust for the wife for life, and (among other things) after the decease of the survivor of the husband and wife, upon trust to raise out of the premises £3,000 for portions. The settlement contained no notice of the land tax or the charge arising from its redemption, and no claim was made by anyone in respect of it.

The leases were renewed every seven years till 1853, since which time the lessor had declined to renew.

Thomas Denne died in 1821, and left *Mary Hilton* his residuary legatee. She was also the surviving executrix of his will.

Mary Hilton survived her husband and died in April, 1866, leaving her son, *Arthur Hilton*, and another her executors; her will was proved by *Arthur Hilton* alone, who thus became the personal representative of his mother and of *Thomas Denne*.

The trustees of the settlement, being about to raise the sum of £3,000 for portions, filed the bill in this suit that it might be determined whether *Arthur Hilton*, one of the Defendants, was entitled, as personal representative of his mother and grandfather, to any charge upon the leasehold property, in respect of the sum

of £776 6*s.* 8*d.* consols, for the redemption of the land tax by the testator *Collard*, and an annual sum of £21 4*s.* by way of interest on it; or whether, as the other Defendants, who claimed solely under the settlement, contended, the Plaintiffs should treat the leasehold property as free from any charge in respect of the redemption of the land tax thereon.

By the 17th section of the 38 Geo. 3, c. 60, it was enacted, that on the transfer of the stock by the person contracting for the redemption of the land tax, the lands comprised in such contract should thenceforth be wholly freed and exonerated from the land tax charged thereon, unless the person contracting for such land tax should, at the time of entering into the contract for the same, declare his option to be considered on the same footing as a person not interested in the lands purchasing the land tax charged thereon, is by the Act considered.

By the 37th section it was enacted, that "when any person shall not, at the time of entering into such a contract for the redemption of such land tax, have declared his option, whereby the lands and hereditaments whereon the land tax shall have been charged shall, by virtue of this Act, be exonerated therefrom, such lands shall be and become chargeable for the benefit of such person, his executors, administrators and assigns, with the amount of £3 per Cent. Bank Annuities which shall have been transferred as the commutation for the redemption of the said land tax, and with the payment of such yearly sum by way of interest as shall be equal to the amount of the land tax redeemed."

Mr. *Wickens*, for the Plaintiffs.

Mr. *Baggallay*, Q.C., and Mr. *Dauney*, for the Defendants, the younger children of Mrs. *Hilton*, who claimed solely under the settlement:—

In this case as *Collard*, by whom the land tax was redeemed, did not exercise his option under the 17th section, the 37th section came into operation, which declares that where the option is not exercised by the person who entered into the contract, the land "shall be chargeable for the benefit of such person, his executors, administrators and assigns," with the amount of consols

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transferred as the commutation, and with the payment of interest in the meantime. Thus *Collard* was owner of the land for the remainder of the term free from land tax as between himself and the Crown, but entitled as against the reversioner to a charge on the inheritance for the sum of £777 6*s.* 8*d.* consols and for the interest in the meantime. He was in the same position as a tenant in tail purchasing a charge on the fee simple is, according to the principle of *Ware* v. *Polhill* (1). In 1809 *Collard* died, having bequeathed the leaseholds to his two daughters. From his death till the date of the settlement of the 17th of July, 1818, the right to the leasehold property and to the charge was in the same persons. By the settlement on Mrs. *Hilton's* marriage, her moiety of the leaseholds, and the other moiety which was vested in *Thomas Denne*, as representative of *Jane Denne*, who had died, were assigned to the trustees on the trusts of the settlement. There was no recital of an intention to keep the charge alive, and the acts of the parties negative such a presumption, for no claim was made by *Thomas Denne* from the death of *Jane Denne*, till his death, in respect of his moiety. Besides, the general words of the settlement were sufficient to pass it, for it is an interest in land arising out of land. On these grounds we contend that the Defendant, *Arthur Hilton*, has no claim as representative of his mother and grandfather to any charge in respect of the land tax.

Mr. *Selwyn*, Q.C., and Mr. *Freeman*, for the Defendant *Arthur Hilton*:—

When *Collard* entered into the contract for the redemption of the land tax, as he did not exercise his option it must be presumed that he entered into it for his own benefit, and that he intended to keep it on foot as part of his personal estate. Till the date of the settlement, the obligation to pay and the right to receive the charge remained in the same hands. The settlors might, if they thought fit, have included this charge in the settlement, but the recital shews no intention to go beyond the property comprised in the leases. The charge in respect of land tax cannot pass without express words, for it is a settled rule that "tithe and land tax are not incumbrances as between vendor and purchaser, nor if the

(1) 11 Ves. 257, 277.

vendor were owner of the tithes in permanency, or of the land tax as a subsisting charge, would the purchaser be entitled to the benefit of either unless expressly included in the contract:" *Hayes's* Concise Conveyancer (1).

In a much stronger case than the present, *Blundell* v. *Stanley* (2), where a tenant in tail, the land tax on whose estates had been redeemed by his guardians during his infancy, suffered a recovery, and afterwards conveyed the estates to the trustees of a settlement with the usual general words, and covenanted that they were "free from all charges and incumbrances whatsoever," except as therein mentioned, and no reference was made to the redeemed land tax, the then Vice-Chancellor *Knight Bruce*, said, "I think that it would be a misconstruction of the settlement to say that it included the land tax, either by the parcels or the covenants, supposing that there were no merger. I think that the intention of the parties was otherwise, and that the words are not sufficient to subvert that intention." If an owner of land, who is also owner of the land tax redeemed, contracts to sell free from incumbrances, he cannot be compelled to convey the charge except by special agreement: see Lord *St. Leonards'* Vendors and Purchasers (3). Then it said that there was such an amount of acquiescence on the part of *Thomas Denne* in not claiming the moiety of the interest to which he was entitled after the date of the settlement, that it amounted to an act of waiver. But his omission to claim the moiety cannot prejudice the rights of the Defendant, *Arthur Hilton*, if, as we contend, the charge existed as a separate property; and as it did not pass under the settlement, *Arthur Hilton* is now entitled to it as representative of his mother and grandfather.

Mr. *Baggallay*, in reply.

Nov. 10. LORD ROMILLY, M.R.:—

The question which arises in this cause is, who is entitled to the land tax which has been redeemed upon certain leasehold premises which belonged to *Henry Collard*.

Henry Collard was entitled to three leases, which were renewable

(1) Page 33, note (*c*). (2) 13 Jur. 998. (3) 14th ed. p. 322.

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by custom every seven years, and held under the Archbishop of *Canterbury*. He took steps, in December, 1798, to redeem the land tax upon it, which he did accordingly, and the land was exonerated from land tax from Lady Day, 1799. The amount payable for the redemption was £777 6*s.* 8*d.* consols, which he transferred to the commissioners. He made no declaration at the time of redeeming the land tax, nor was he, of course, seised or entitled to any estate of inheritance in the lands.

By sect. 37 of 38 Geo. 3, c. 60, it was enacted: [His Lordship then read the section.]

Collard made no declaration, and did not exercise the option under the Act.

The first question that is raised is, whether, upon the construction of this clause in the statute, the land tax redeemed was not merged in the land, at least so long as the lease continued. I am of opinion that, if it is merged at all, it must be merged entirely for the entire and complete benefit of the estate. It has been determined that an estate tail is not an estate of inheritance within the meaning of this Act, and that has since been followed; and it is obvious how very important it is, because, if it were merged for the benefit of the estate, it would belong to the heir in tail, and not to the legal personal representative. It is not contended that it was merged entirely for the benefit of the estate, so that the persons entitled in reversion could get the benefit of it, but that it is merged to this extent, that as long as the lease continues no land tax exists, but as soon as the lease ceases, then the land tax, as it were, revives against the reversioner. I cannot adopt that view of the case. I am of opinion that this clause in the Act is distinct upon it. It says it shall vest in the person, "his executors, administrators, and assigns;" and therefore I am of opinion that when *Collard* redeemed this land tax, he had then a charge upon the land to the amount of £777 6*s.* 8*d.* consols, and also, till that was raised, he had a rent charge upon it to the extent of the interest of that sum, that is about £21 4*s.*, arising out of the land, and that this was a separate property in him, which he might deal with as such, distinct from his right under the lease. I am of opinion, therefore, that the proper construction of the Act of Parliament has not settled this question in favour of Mr. *Baggallay's* clients.

Then what took place was this: *Collard*, by his will, gave his leaseholds to his two granddaughters, *Mary* and *Jane Denne*, and then he gave the whole of his residue to them equally, absolutely, and made no mention whatever of the land tax. If I am right in the view that I have taken of the case, there was a specific bequest of the leaseholds, and the general bequest of the residue carried with it this charge upon the leaseholds; and, consequently, they took the charge as the residuary legatees.

The next question that arises is, whether this has been included in the settlement which has been made upon the marriage of one of these ladies. What occurred was this: *Henry Collard*, having made his will, died in 1809. *Mary* attained her age of twenty-one in 1812, and one-half was assigned to her, and *Jane* attained her age of twenty-one in 1815. She died in 1817, and her father was her administrator. Subsequently, in July, 1818, a settlement was made upon the marriage of *Mary Denne* to *John Hilton*. These leaseholds, expressly stating them as leaseholds, were assigned to trustees upon the trusts of the settlement; and, by the general words of the habendum, all the interest whatever in the lands, both of the father and of the lady, was conveyed to the trustees upon the trusts of the settlement.

The question is, whether this rent charge and incumbrance of £777 6*s.* 8*d.* consols was included in that settlement. I am clearly of opinion that it was not. The general words, no doubt, are quite sufficient to include all their interest in the land. The cases are very numerous upon the subject, and I have always considered, of late years, that where the recital is that you intend to convey certain specific property, and the general words in the habendum, including "interest," and the like, are sufficiently large to carry other property which is not specified and is distinct from that which is specified in the recital, that that other property does not pass. For instance, if a man has a general rent charge upon the fee simple of an estate, and is also the lessee of long leaseholds, and he assigns the leaseholds and all his interest in the land, that does not thereby pass the rent charge which he had upon it, which was never intended to pass under such circumstances. The cases upon that point are numerous, and appear to me very distinct. A very strong case was cited to me by

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Mr. *Selwyn*, of *Blundell* v. *Stanley* (1), which establishes the proposition.

I am of opinion, therefore, that this charge of £777 6*s.* 8*d.* consols was never intended to be conveyed by the settlement, and was not, in fact, included in it; and that, therefore, it does not pass to the persons who are interested solely under the settlement.

Then it was contended that the mode of dealing with the estate shewed that this was to belong to the persons who were interested under the settlement, inasmuch as from the date of the settlement in the year 1818, to the death of *Thomas Denne*, in 1821, *Thomas Denne* never received the half of the charge amounting to the land tax to which he was entitled. I cannot concur in that view of the case; the fact of *Thomas Denne* not having received it cannot deprive any other persons of their rights, nor is it any waiver of their rights whatever.

I am of opinion that the charge passed under the residuary bequest in *Collard's* will, and must be distributed accordingly.

Solicitors: Messrs. *Kingsford & Dorman*, agents for Messrs. *Wightwick, Kingsford, & Fraser, Canterbury.*

Applied: *Re* RUSHBROOK'S WILL TRUSTS. [1948] 1 All E.R. 932.

M. R. 1866 Nov. 5; Dec. 4.

Referred to. *Re* RUSHBROOK'S WILL TRUSTS. [1948] 1 Ch. 421.

COOPER *v.* JARMAN.

Building Contract—Non-completion—Death—Heir and Next of Kin—Conversion.

A person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished:—

Held, that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

THIS was the further consideration of a suit for the administration of the estate of *John Boykett Jarman*, who died intestate on the 23rd of February, 1864. On the 1st of April following, letters of administration of his estate and effects were granted to *Joseph Charles Jarman* and *Ann Elizabeth Jarman*, two of his children. *Joseph Charles Jarman* was also his heir-at-law.

(1) 13 Jur. 998.

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On the 12th of October, 1863, the intestate had entered into a contract with Messrs. *James* and *Robert Lawrence*, for the erection, by them, of a house on a piece of freehold land belonging to him. The house was in course of erection, but not finished, at the time of his death; it had since been finished, and *Joseph Charles Jarman* had paid £799 19*s.* out of the personal estate of the intestate to Messrs. *Lawrence* for the completion of the contract by them. The question now raised was, whether the payment of this sum ought to be allowed to *Joseph Charles Jarman*, as the legal personal representative of the intestate.

Mr. *Jessel*, Q.C., and Mr. *F. H. Colt*, for the next of kin of the intestate:—

The heir-at-law ought to bear the expense of completing the house. There can be no conversion of personalty into realty so as to benefit the heir-at-law, except by a binding contract of which a Court of equity can decree specific performance; and a builder's contract cannot be specifically performed: *Garnett* v. *Acton* (1); *Ingle* v. *Richards* (2); *Brace* v. *Wehnert* (3). The administrator could not have completed the house if the heir had objected; he might have become liable in damages to the builders by reason of the non-completion; but that could not have been helped. It may be proper to allow the administrator, in his account, the amount of such damages, but nothing beyond. The completion of the contract cannot alter the rights of the parties; these must be the same as they were at the death of the intestate.

Mr. *Selwyn*, Q.C., and Mr. *J. P. Beck*, for the heir-at-law:—

The simple question is, did the intestate intend that the house should be completed? It is wholly beside the question to consider whether the contract can be enforced in a Court of equity; the mode of enforcing the contract has nothing to do with this question. Wherever there is a binding contract, there is an obligation which must be satisfied out of the personal estate of the person who came under the obligation in his lifetime. It cannot be said that, for the sake of benefiting a particular class, the administrator is to break the contract, and pay a sum of money

(1) 28 Beav. 333. (2) 28 Beav. 361. (3) 25 Beav. 348.

6 Jur N S 1170. 4 Jur N S 549.

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in respect of damages for the breach. That would simply be throwing away a part of the intestate's estate without benefit to either next of kin or heir-at-law. In fact, however, the point is concluded by authority: *Holt* v. *Holt* (1).

Mr. *Jessel*, in reply:—

Holt v. *Holt* proves too much. According to that case, a decree can be made for specific performance of a building contract: but that is not so. The law now is, that a building contract, *per se*, will not be enforced, though the Court will not refuse to enforce a contract simply because an agreement to erect buildings is a subsidiary part of it: *Kay* v. *Johnson* (2).

This question is not one of intention at all. Where a contract cannot be specifically enforced, the Court pays no regard to intention. But, further, the intestate cannot be supposed to have had any intention of imposing a burden on the personalty to benefit the realty. It was, therefore, the duty of the administrator to abstain from conferring any benefit on the heir to the prejudice of the next of kin. It is only by the act of the heir that this contract has been completed; if he had objected, the builders could not have entered on the land; and that ought not to prejudice the case.

The case is wholly different from a contract for the purchase of real estate. If a person contracts to purchase an estate, then, if a good title can be shewn to the estate, there is a debt due from the purchaser, which must be satisfied out of his personal estate, if he dies before completion; and the same is the case if he waive an objection to title. But a waiver of an objection after his death will not create a debt. Here there was no debt due from the intestate at the time of his death: the period for payment had not arrived. The only liability was a certain amount of damages.

Dec. 4. LORD ROMILLY, M.R., after stating the facts, continued:—

The next of kin contend that this sum ought not to be allowed,

(1) 2 Vern. 322. (2) 2 H. & M. 118.

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and that the heir-at-law must personally bear the expense of completing the house. The ground on which this is insisted on by the next of kin is, that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it, and that if he had done so, and had in the middle stopped the further building of the house, the only remedy which Messrs. *Lawrence* could have had against him would have been by an action for damages sustained by them by the breach of contract by the intestate. There can not, however, be any question but that the administrator would have been liable, in an action brought by the Messrs. *Lawrence*, if he had refused to allow them to complete the contract. The case of *Wentworth* v. *Cock* (1) is distinct on this point; where, in an action against an executor for refusing to receive slate ordered by the testator, the Court of Queen's Bench held that the action would lie, and that the legal personal representative must receive and pay for goods ordered by the testator. Of course it would be the same in the case of an intestate. I think it cannot be good law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate. There is, as it appears to me, a wide distinction between a case of this description and the case of a contract for the purchase of a piece of land. In that case, the personal estate of the intestate, or testator, is bound to pay the purchase-money, provided a good title can be made; but if a good title cannot be made, then there is no contract, and no action would lie against the representatives of the intestate, because the contract, in the absence of any express stipulation, necessarily is inferred to have been to buy land with a good title; and if the deceased person had contracted to buy land with any particular title, in a manner to bind him, this contract would bind the personal estate in the hands of the next of kin. But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death

(1) 10 Ad. & E. 42.

M. R. 1866 COOPER v. JARMAN.

intended to be performed by him, merely because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person, or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the Messrs. *Lawrence* had, therefore, refused to go on with the building, an action would have lain against them at the suit of the administrator; and it cannot, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. *Lawrence*, and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfilment of the contract. Besides which, if I am so to hold, no rule could be adopted which would be certain. The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of the contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted, and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit, should exceed the amount to be paid for the completion of the contract, could the legal personal representative be allowed to deduct this in taking the accounts? I apprehend clearly not. The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am, therefore, of opinion that this sum has been properly allowed in the accounts of the administrator.

Solicitors for the Next of Kin: Messrs. *Langley & Gibbon.*
Solicitor for the Heir-at-Law: Mr. *S. Adams Beck.*

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Nov. 15, 17, 19.

Grant by the Crown—Inhabitants—Royal Forest—Estovers.

A grant by the Crown to the inhabitants of *L.*, which was a Crown manor and parish within a royal forest, that the labouring or poor people inhabiting the parish, and having families, might, during a certain period of every year, cut or lop the boughs and branches above seven feet from the ground, on the trees growing on the waste lands of the manor and parish of *L.*, for their own use and consumption, and for sale, for their own relief, to all or any of the inhabitants for their consumption within the parish as fuel:—

Held, upon demurrer, a valid grant.

THIS was a demurrer for want of equity.

The bill was filed by a labourer, inhabiting the parish of *Loughton*, in *Essex*, on behalf of himself and all other the inhabitants of the parish, against the Rev. *John W. Maitland*, the lord of the manor of *Loughton*, and two persons, who had purchased from him part of the waste lands of the manor. It stated that the parish and manor of *Loughton* are within the Royal Forest of *Waltham;* that the common and waste lands lying within the several manors and parishes in and adjoining to the said forest are subject to divers chartered and other rights in the parishioners and inhabitants, to have or cut wood from the said forest for fuel and other purposes, for their own use and for sale, at certain seasons of the year; and that Her Majesty Queen *Elizabeth*, being then lady of the manor of *Loughton*, by her royal charter granted to the inhabitants of the parish, that the labouring or poor people inhabiting the said parish, and having families, might at all times, commencing from the hour of twelve at night on the 11th day of November in every year, until the same hour on the 23rd day of April in the succeeding year, cut or lop the boughs and branches above the height of seven feet from the ground on the trees growing upon the waste lands of the said manor and parish (except on certain specified portions thereof), and that the rightful disposition of the wood so cut by such inhabitants was for the proper use and consumption of themselves, and for sale, for their own relief, to all

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or any of the inhabitants, for their consumption, within the same parish as fuel; that the inhabitants had, since the charter, continuously exercised the right so granted; that the said charter, which was formerly among the records of a Forest Court, called the Verderer's Court, had, together with such records, been long since lost or improperly disposed of, but that there were divers documents and entries in the Court rolls, and other records relating to the manor, referring to, or containing evidence of, the charter, and the right thereby granted; that the Defendant *Maitland*, who claimed to have purchased from the Crown the manor of *Loughton*, and the forestal rights over the waste lands, claimed an absolute right to the timber growing on the waste lands, and a right to inclose and sell the fee simple and inheritance of the said lands, and to deprive the inhabitants of their right under the charter, and that he had accordingly inclosed parts of the waste lands, upon which trees were growing, and had assumed to convey parts thereof to the other Defendants in fee simple; that the Defendants had cut down and converted to their own use timber growing on parts of the waste lands, and had offered parts of the same land for sale as building ground, and intended to build houses thereon; and that the Defendant *Maitland* had attempted to stop the exercise by the inhabitants of their rights under the charter; and it charged that the Crown did not claim, and did not sell to the Defendant *Maitland*, any estate, right, or interest in the soil or timber of the waste lands, or any rights other than the forestal rights, and that such rights consisted, at the utmost, of the deer, the herbage, vert, and browse, the power to enforce a fence month, during which the commoners' stock must be removed from the forest, and the power to compel the fences of all inclosures lawfully made within the forest to be kept to a height not exceeding four feet; and it prayed that the Plaintiff, and the other labouring or poor people inhabiting the parish of *Loughton*, and having families, might be declared entitled to the right granted by the charter; that the Defendants might be restrained by injunction from fencing in or inclosing, or suffering to remain fenced in or inclosed, any part of the lands subject to the said right, and from cutting down the trees growing thereon, and from otherwise interfering with the exercise of the right; that the title of the Plaintiff

and the other inhabitants to the right claimed might be ascertained by the trial of issues, or in such other manner as the Court should think fit, and that they might be quieted in the enjoyment thereof; and that the Defendants might account for the profits derived from cutting down the timber in derogation of the rights of the inhabitants.

The Defendant *Maitland* demurred.

Mr. *Baggallay*, Q.C., Mr. *Bristowe*, and Mr. *Marshall Griffith*, for the demurrer:—

The right claimed by the bill cannot exist in law. It could not be claimed by custom, being a right to take profits *alieno solo*: *Gateward's Case* (1); *Grimstead* v. *Marlowe* (2); nor by prescription, because the persons who claim it are not a corporation, but an uncertain and fluctuating class, incapable of releasing the right, and because the right itself is unreasonable and unlimited. In *Selby* v. *Robinson* (3), a custom for the poor and indigent householders living in *A.* to cut and carry away boughs and branches in a chase in *A.*, was held bad on account of the vagueness of the description of the persons, and the reasons for that decision apply equally to a claim by prescription or grant. The inhabitants of a parish cannot prescribe for common in their own names, though the corporation of a borough may prescribe for themselves and the other inhabitants: *White* v. *Coleman* (4). In *Constable* v. *Nicholson* (5), it was held that a right for the inhabitants of a township to take stones from the land of *A.*, for the purpose of repairing the highways, could not be claimed either by custom or prescription. In *Clayton* v. *Corby* (6), a claim by prescription of a right in the occupiers of a brick-kiln to dig and carry away from the close of another so much clay as was at any time required by them for the purpose of making bricks at the brick-kiln, was held invalid, on the ground of the uncertainty of the claim. Lord *Denman*, in his judgment in that case, said that, in all cases of a claim of right *in alieno solo*, such claim, in order to be valid, must be made with some limitation and restriction; and he referred to *Wilson* v.

(1) 6 Rep. 59*b*.
(2) 4 T. R. 717.
(3) 2 T. R. 758.
(4) Freem. K. B. & C. P. 134.
(5) 14 C. B. (N. S.) 230.
(6) 5 Q. B. 415.

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Willes (1), and *Peppin* v. *Shakespear* (2), observing that, although those were cases respecting the validity of customs, the reasons upon which the judgments were founded had a strong bearing upon the degree of certainty and precision with which a claim of right generally, in order to be supported, ought to be described. To the same effect is the opinion of *Byles*, J., in *Attorney-General* v. *Mathias* (3). But as the right could not be claimed by prescription, which rests on a presumed grant, so it could not be the subject of a grant. The inhabitants, as such, are incapable of taking a grant: *Sheppard's* Touchstone (4); *Constable* v. *Nicholson* (5). The right of estovers or botes must be reasonable, and limited by the necessity of the person who claims it, for his personal enjoyment, or the enjoyment of the tenement to which the right is appurtenant: *Co. Litt.* (6); *Valentine* v. *Penny* (7); *Earl of Pembroke's Case* (8); but the right claimed by the bill is a right to cut boughs, not only for the consumption of the poor inhabitants, but also for sale by them, which is inconsistent with the nature of estovers, and unreasonable. In *Comyn's* Digest, where all sorts of grants are enumerated, there is no mention of any grant like that which is set up by this bill.

Mr. *Joshua Williams*, Q.C., Mr. *Speed*, and Mr. *W. R. Fisher*, for the bill:—

The right claimed by the bill is not claimed by custom, or by prescription, but by virtue of a grant. A grant by the Crown to the inhabitants of a place is valid, because, the Crown having the power of creating a corporation, the inhabitants are by the grant incorporated for the purpose of the grant; so "if the King grants lands to the men or inhabitants of *D.*, *hæredibus et successoribus suis*, rendering rent, for anything touching these lands, this is a corporation, but not to other purposes": *Bac.* Abr. (9); and "if the King grants *hominibus de Islington* to be discharged of toll, this is a good corporation to this extent, but not to purchase" (10). In the same way, if an Act of Parliament confers a right on

(1) 7 East, 121.
(2) 6 T. R. 748.
(3) 4 K. & J. 579.
(4) Page 237.
(5) 14 C. B. (N. S.) 230.
(6) Page 41*b*.
(7) 3 Cru. Dig. 71; Noy, 145.
(8) Clayton, 47.
(9) Tit. "Corporation," B.
(10) Bac. Abr. *ubi sup.* note.

persons who cannot take it, except by being incorporated, they are, by implication, incorporated for that purpose: *Conservators of the River Tone* v. *Ash* (1); *Ex parte Newport Marsh Trustees* (2).

Moreover, this being a grant of a privilege within a royal forest, would be a good grant, even if the inhabitants were not incorporated. By the forest law, a grant of a privilege within a forest to all the inhabitants, being freeholders, is good: 4 Inst. (3). In consequence of the severity of the forest laws, such grants being in derogation of the forestal rights, have always been favourably regarded: *Manwood* on Forest Laws (4). It appears from a statute of 33 Edw. 1 (5), that the owners of land in parts of the royal forests, which had been disafforested, had, so long as they had remained in the forest, "common and other easement." From the *Itineraries* of 8 Edw. 3 (6), it appears that a claim by the burgesses of *Lancaster*, under a grant from King *John*, to have as much dead wood in the forest of *Lancaster* as they wanted to burn, and as much other wood as they wanted for building, and to have common of pasture for all their beasts, was recognised and confirmed. By the recent Act for disafforesting *Hainault Forest* (7), the right of certain poor widows to have a load of wood on Easter Monday out of the forest, or, in lieu thereof, 8s. in money, is admitted, and compensation is allowed for it. The right claimed by the bill is neither uncertain nor unreasonable; the wood cut is only to be sold to the inhabitants, for their consumption, within the parish; and the cutting of boughs above the height of seven feet, that is to say, out of the reach of the deer in browsing, and during the season when the boughs are not growing, would rather tend, by stimulating the growth of the lower branches, to improve the covert and pasture of the deer. The lord of the manor cannot inclose against common of estovers: 2 Inst. (8); *Fitz.* Abr. (9); *Manwood* on Forest Laws (10); *Grant* v. *Gunnor* (11). The Defendants, who claim through the Crown, cannot derogate from the grant of their predecessor in title. The authorities cited on

(1) 10 B. & C. 349.
(2) 16 Sim. 346.
(3) Page 297.
(4) Tit. "Common in Forests," pl. 73.
(5) Cap. 5.
(6) Lord *Hale's* MSS. (in *Lincoln's Inn Library*), vol. 44.
(7) 14 & 15 Vict. c. 43.
(8) Page 87.
(9) Tit. "Comen," § 25.
(10) Tit. "Common of Forest," pl. 45.
(11) 1 Taunt. 435.

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the other side are all cases either of custom or prescription, except the passage from *Sheppard's* Touchstone, and that refers only to a grant by a subject. [As to the jurisdiction of a Court of equity to entertain the suit, they cited *Adair* v. *New River Company* (1), *Mayor of York* v. *Pilkington* (2).]

Mr. *Baggallay*, in reply :—

The authorities do not shew that a grant by the Crown, of a right to take profits, to the inhabitants, without words of succession, is good. Lord *Coke* speaks of a grant to the freeholders within the forest (3). The case in *Bac.* Abr. (4) is of a grant to inhabitants, their heirs, and successors; and the case of the men of *Islington* was not one of grant of a profit, but of release from a liability. The allowance of a compensation to the widows under the *Hainault Forest Act* may well have been an act of grace on the part of the Crown, and does not prove the legality of their claim. No case can be found of a right of estovers for the purpose of sale.

Nov. 19. LORD ROMILLY, M.R. :—

The question upon this demurrer is, whether such a grant as is stated in the Plaintiff's bill can be legally made by the Crown. Many cases were cited to me, for the purpose of establishing, first, that this right would be bad, if claimed by custom, because it would be a custom to take a profit on another man's land; next, that it would be bad if claimed by prescription, because such a claim must be both reasonable and certain, and this is neither, as the poor, or labouring, inhabitants of the parish are perfectly uncertain. I do not think it necessary to go into the question with respect to the truth of these propositions so stated; in point of fact they are not disputed, and, I apprehend, as stated to me, and as they were also stated by the counsel for the Defendant, they could scarcely be disputed; but they do not affect the case which is made by this bill, which is not the case of a custom, nor the case of a prescription, but is the case of a grant; and, what is more,

(1) 11 Ves. 429.
(2) 1 Atk. 282.
(3) 4 Inst. 297.
(4) Tit. "Corporation," B.

a grant by the Crown; and, what is still more important, a grant by the Crown in derogation of certain forestal rights belonging to the Crown. On this part of the case, which is the real question, no authority whatever has been cited to me to shew that such a grant is not perfectly good. A passage has been cited from *Sheppard's* Touchstone, to the effect that a grant cannot be made to the inhabitants of a parish as such, for, although they may be all capable of taking individually as grantees, yet they cannot take under that general designation; but that passage applies solely to grants by private individuals. Several authorities were cited by Mr. *Joshua Williams*, to establish the proposition, which I apprehend to be indisputable, that a grant by the Crown to a class of persons is good. The distinction between a grant by a private individual and a grant by the Crown, is this, that as the Crown has the power to create corporations, so, if it is necessary for the purpose of establishing the validity of the grant, the grantees will be treated as a corporation *quoad* the grant, which is not the case with a grant by a private individual, because a private individual has no power of creating a corporation; the passages from *Bacon's* Abridgment, and various other authorities which have been cited, are clear and distinct on that point, and, at the same time, they draw the distinction that such a grant cannot be made by private individuals, and that is the sole question to which the passage in *Sheppard's* Touchstone applies. But it should be observed that, although it is true, as stated in *Sheppard's* Touchstone, that a grant cannot be made beneficially to the inhabitants of the parish, as grantees, yet it is certain that a grant may be made by a private individual, in the shape of a charity, in trust for the poor inhabitants of a parish, and that such a trust is perfectly good; it is true that they are not the immediate grantees, but, in fact, they are the beneficial grantees, and such a grant is perfectly good, though made by a private individual. The books are full of cases in which grants of that description have been supported and established, and this Court has carried the trusts into execution. The case of the *Newport Marsh Trustees* (1) is a striking instance of the way in which this Court will treat grantees as a corporation, for the purpose of making valid a grant of that description.

(1) 16 Sim. 346.

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Another circumstance, which is very strong in favour of the bill, is, that this is a grant by the Crown in derogation of its forestal rights; I entirely assent to the statement of Mr. *Joshua Williams*, that grants by the Crown, in derogation of its forestal rights, are to be considered and treated in a different manner from other grants. The forestal rights were excessively oppressive upon the inhabitants, and accordingly the Crown frequently made to the inhabitants in the neighbourhood of a forest certain grants in derogation of those rights; which grants, though they might not be good in every other respect, were good so far as they were in derogation of those forestal rights. A singularly striking instance that a grant of this description may be good, is afforded by the case of the statute of 14 & 15 Vict. c. 43, by which *Hainault Forest* was disafforested. It appears that there was a certain claim made by widows residing within a certain district, who had been widows for a period of twelve months, to be allowed to take a load of wood from the forest at a particular time, and if they could not do this, to have 8*s.* in lieu of the load of wood. That is a very similar species of claim to that which is stated in this bill. The Crown considered that a perfectly good claim, and, accordingly, it was valued, and an allotment made in respect of it, for the benefit of the widows residing within that district.

I say nothing about the merits of this case when it comes to the hearing, but, upon demurrer, the Defendant must make a very strong case indeed, when he calls upon me to say it is so clear that no case can seriously be made, or argued, at the hearing, to support such a grant as this. Accordingly, when the case was opened, I expressed some doubt whether this was a point that could be decided in favour of the Defendant on demurrer; and I am of opinion, as it stands on the bill, if the whole bill is to be taken as true, that there is a case made for relief, and that the demurrer must be overruled in the usual manner.

Solicitor for the Plaintiff: Mr. *P. H. Lawrence.*
Solicitors for the Defendant: Messrs. *Tamplin & Tayler.*

PETERSON *v.* PETERSON.

M. R.
1866
Nov. 19
Dec. 6.

Administration—Wasting of Assets—Next of Kin—Refunding.

Where one of several residuary legatees or next of kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*, if the wasting has taken place before such share was received.

In the latter case, the burden of proof lies on those who call upon the residuary legatee or next of kin to refund, to shew that the wasting took place before the share was paid over.

PHILIPPA TOGHILL, by her will, dated the 29th of October, 1852, bequeathed her residuary personal estate to her daughter *Amy Peterson*, whom she appointed sole executrix of her will. The testatrix died on the 6th of August, 1854.

Amy Peterson died on the 31st of March, 1856, intestate, leaving her brother, *Joseph Peterson*, and eight nephews and nieces, *Thomas Pexton Peterson; Mary*, the wife of *Sidney Hadley; Celia*, the wife of *Oliver Lilly*; *Eleanor*, the wife of *Samuel Gwyer*; *Edwin Peterson; Philippa*, the wife of *Charles Prowse; Victoria*, the wife of *Stamford Parker*; and *Cornelius George Peterson*, her next of kin.

On the 11th of September, 1856, letters of administration to the estate and effects of *Amy Peterson* were granted to *Thomas Pexton Peterson*; and on the 16th of April, 1857, letters of administration to the estate and effects of *Philippa Toghill*, left unadministered, with her will annexed, were also granted to him.

In and previously to November, 1857, *Thomas Pexton Peterson* made the following payments in respect of the shares of the personal estate of *Amy Peterson*, coming to her next of kin:—to Mrs. *Hadley*, or on her account, £2000; to Mrs. *Lilly*, or on her account, £2350; and to Mrs. *Gwyer*, or on her account, £1,450.

On the 15th of January, 1858, a claim was filed by *Edwin Peterson*, against *Thomas Pexton Peterson*, for the administration of the estate of *Amy Peterson*; and on the 16th of July, 1858, another claim was filed by *Thomas Pexton Peterson*, against *Edwin Peterson*, for the administration of the estate of *Philippa Toghill*. On the 23rd of January, 1859, decrees were made in both suits; and the

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next of kin obtained leave to attend the proceedings. On the 19th of February, 1861, certificates were made, by which it appeared that £4927 14*s.* 8*d.* was due from *Thomas Pexton Peterson* in respect of *Amy Peterson's* estate, and £7,382 2*s.* 9*d.* was due from him in respect of *Philippa Toghill's* estate. The clear residue of the estate of *Amy Peterson*, exclusive of the sums due from *Thomas Pexton Peterson*, appeared to be £24,327 16*s.* 10*d.*

In April, 1861, *Thomas Pexton Peterson* was adjudicated a bankrupt, and no dividend had been, or was likely to be, paid on his estate. The net sums of £4997 14*s.* 8*d.* and £7382 2*s.* 9*d.* were thus lost to the estate of *Amy Peterson*; and Mrs. *Hadley*, Mrs. *Lilly*, and Mrs. *Gwyer* had, in consequence, received sums considerably in excess of what would come to the other nephews and nieces in respect of their shares of the estate of the intestate. Under these circumstances the two suits now came on to be heard upon further consideration, and along with them was heard a Petition by Mr. and Mrs. *Prowse*, praying that Mr. and Mrs. *Hadley*, Mr. and Mrs. *Lilly*, and Mr. and Mrs. *Gwyer*, might be ordered to repay the amounts overpaid to them, with interest.

Thomas Pexton Peterson was cross-examined in the suit as to how he had disposed of the assets of the intestate. The material facts disclosed by this cross-examination are stated in the judgment.

Mr. *Southgate*, Q.C., and Mr. *Jones Bateman*, for the Petition:—

This is not the case of a legatee coming to an executor, and insisting on being paid. In such a case, if the legacy is paid, and the estate afterwards becomes deficient, there may be no remedy against the legatee. But here the estate of an intestate is to be distributed in a suit to which the next of kin are parties: they must do equity; and equality is equity. Those who have been overpaid must, therefore, refund: *David* v. *Frowd* (1); *Sawyer* v. *Birchmore* (2).

Mr. *Baggallay*, Q.C., Mr. *J. Pearson*, Mr. *Fooks*, jun., Mr. *E. Cutler*, and Mr. *Fry*, for other next of kin in the same interest.

Mr. *Selwyn*, Q.C., and Mr. *Locock Webb*, for the Respondents to

(1) 1 My. & K. 200. (2) 2 My. & Cr. 611.

the Petition, Mr. and Mrs. *Hadley*, Mr. and Mrs. *Lilly*, and Mr. and Mrs. *Gwyer*:—

The estate was at one time sufficient to pay each person what he has received, and more. If a legatee, or one of the next of kin, has not received more than his legacy, or real share of the estate, he cannot be made to refund when the deficiency is caused by the subsequent wasting of the fund: *Williams* on Executors (1), *Anon.* (2), *Walcott* v. *Hall* (3), *Downes* v. *Bullock* (4). Here the deficiency is caused by the bankruptcy of the administrator.

Mr. *Southgate*, in reply:—

All the persons interested are before the Court, and therefore complete justice can be done between them. The suit has not been instituted to recover back the over-payments, but to administer the estate of the intestate.

He further contended that the evidence shewed that the estate had been wasted before the payments had been made to the Respondents to the Petition, and that the case, therefore, was not one where the assets were sufficient at the time of the payments being made, and were afterwards lost by waste or misfortune. Nor, again, had the fund at that time been divided into the proper number of shares, and appropriated to the several next of kin. In such a case, it might be that there would be no refunding: *Orr* v. *Kaines* (5). At the time when the payments were made, the administrator was hopelessly insolvent, and the suits were only instituted to keep off the other next of kin.

Dec. 6. LORD ROMILLY, M.R., after stating the facts, continued:—

The result is, that if no wasting of the assets had taken place by *Thomas Pexton Peterson*, the Respondents would have been paid the full amount of their shares of one-sixteenth each of the assets divisible among them; but if the assets divisible are to be reduced

(1) Vol. ii. p. 1345, 6th ed.
(2) 1 P. Wms. 495.
(3) 2 Bro. C. C. 305.
(4) 25 Beav. 54.
(5) 2 Ves. Sen. 194.

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by the amount due from *Thomas Pexton Peterson*, then the Respondents have been overpaid to the extent of the amounts sought to be recovered in the Petition, if interest be calculated on those sums from the time of their payment.

I think that the whole question turns upon this: Did the wasting of the assets take place before the Respondents were paid, that is, before the 25th of November, 1857, when the last payment was made? The rule is, that if one of the residuary legatees has received only his share, the subsequent wasting of the assets by the executor will not entitle the other residuary legatees to call upon him to refund; and there is obvious good sense in that rule; for, if the executor renders his accounts to a residuary legatee, and pays him his share, what right or business has the residuary legatee further to interfere in the matter of the administration of the estate? He cannot file a bill for the administration of it, and, were he to do so, he would probably have to pay the costs. If so, why is he to suffer for the laches and neglect of the other residuary legatees, who have not required the executor to account to them, or to pay over the balance in his hands, or due from him? The case, however, is materially altered if the executor has dissipated a portion of the assets before any residuary legatees call upon him to account; and, it would seem, the rule ought to be that what is available at that time should be equally divisible among the whole of the residuary legatees; but, where one residuary legatee calls upon another to refund, upon the ground of being overpaid, then, in my opinion, the burden of proof lies upon the person requiring the money to be refunded, to shew that the payment was made in excess. He must prove that, at the time the share was paid, the residuary legatee received more than the share at that time properly payable to him. In this case, I understand it to be admitted that before any of the assets were wasted by *Thomas Pexton Peterson*, the share of each residuary legatee exceeded the largest amount payable to any one of the residuary legatees in question. It is obvious that it exceeded the share of each, if no *devastavit* had occurred; the amount, at least, paid to Mrs. *Hadley* and Mrs. *Gwyer;* and I state that because it appears to me there might be a question with respect to the share which was paid to Mrs. *Lilly*, or Mr. *Lilly* on her account. It appears there was paid to her £2350;

and, if I correctly make out the account, the share of each, being one-sixteenth of the whole estate, would not be more than £2290. If so, she would have been overpaid about £60. But that does not affect the principle which I am now proceeding upon; at all events, the one-sixteenth exceeded the amount paid to Mrs. *Hadley* and Mrs. *Gwyer*. It is, therefore, incumbent on the Petitioners to establish that, when the money was so paid, the assets were insufficient for that purpose. The aunt died on the 31st of March, 1856. In September following, that is, five months and a-half later, *Thomas Pexton Peterson* obtained letters of administration; and the last payment was made to Mrs. *Gwyer* on the 25th of November, 1857. The suits were instituted two months later, and the bankruptcy of *Thomas Pexton Peterson* did not take place until April, 1861, that is, more than three years after the suits were instituted. I have looked in vain through the evidence to find anything to satisfy me that in November, 1857, *Thomas Pexton Peterson* was unable to account for the whole of the estate received by him. I have read through two long cross-examinations of *Thomas Pexton Peterson*, one in November, 1859, and the other in February, 1860, by which it appears that he was generally in distressed circumstances during the lives of both of these ladies, that he frequently pawned his watch, and that he overdrew his account at his bankers by £110 in March, 1855, and that he borrowed money from his bankers in December, 1859. This last borrowing was made for the purpose of purchasing the house he resided in, which he afterwards sold, but this does not shew, that after the death of the aunt, in 1856, he was unable to pay what he owed, or to account, after he became her administrator, for her estate which he got in. It does, however, appear that he disposed of a considerable amount of property in January, 1858, when the suits were instituted, and, in particular, he parted with a considerable portion of it between the two examinations of November, 1859, and February, 1860, the proceeds of which he refused to state how he dealt with.

I am unable, from these facts, or from anything else contained in the evidence, or from any affidavits which have been supplied to me, to come to a secure conclusion that if *Thomas Pexton Peterson* had, in November, 1857, been compelled to sell all his property, and realise all his assets, he would have been unable to pay the full

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amount due from him to the estate of these two ladies. This being so, I must refuse to comply with the prayer of this Petition, and I make no order upon it.

I was also, to some extent, influenced by this, that even if I had thought there was some proof that he had before that time wasted some portion of the assets, it would be a difficult and expensive inquiry to ascertain what was the extent to which he had disposed of such assets; and considering there is distinct evidence in the cross-examination that he disposed of a very large portion of property after November, 1857, that he did not bring that into account, that he refused positively to say what he did with it, and that the burden of proof lies upon the Petitioner, I am of opinion that the proper course is to make no order upon the Petition.

An order was made in the suits for payments to the next of kin (other than Mrs. *Hadley*, Mrs. *Lilly*, and Mrs. *Gwyer*) of the amounts to which the Chief Clerk had certified that they were entitled. An inquiry was directed as to whether Mrs. *Lilly* had been overpaid, if any of the next of kin should think fit to prosecute it.

Solicitors: Messrs. *Matthews & Greetham;* Messrs. *Poole & Gamlen;* Messrs. *Rickards & Walker;* Messrs. *Vallance & Vallance;* Messrs. *Mead & Daubeny.*

WILSON *v.* GREY.

V.-C. S.
1866
Nov. 20.

Contract for the Sale of Ecclesiastical Lands—Minerals—38 *Geo.* 3, *c.* 60, 39 *Geo.* 3, *cc.* 6 *and* 21.

A contract for the sale of lands, with their appurtenances, belonging to a rectory, was entered into under the 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the *Bank of England*, as directed by the Acts, and the execution of the conveyance, the 39 Geo. 3, c. 21, was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold, should be absolutely excepted and reserved; and that the provisions of this Act should, in the execution of the former Acts, be applied as if they had been specially enacted in those Acts:—

Held, that the minerals passed to the purchaser.

In January, 1799, the Rev. *E. T. Thurlow*, the rector of *Houghton-le-Spring, Durham*, was desirous of selling, under the provisions of the Acts 38 Geo. 3, c. 60 (21st of June, 1798), and 39 Geo. 3, c. 6 (22nd of December, 1798), the *Water Furs Farm*, containing about thirty-eight acres, part of the glebe of the rectory, for the purpose of redeeming £28 2*s*. land tax, charged on the rectory glebe.

The 38 Geo. 3, c. 60 (which was a temporary Act, extended by 39 Geo. 3, c. 6, and subsequent Acts), by sect. 19 empowered all bodies corporate to sell lands for redemption of land tax thereon, and by indentures enrolled within six months in any of the superior Courts to convey the same free of land tax, with a proviso requiring (in the case of a sale by a parson) the consent of the ordinary and patron. The 23rd section enacted that every sale after such enrolment as aforesaid, and after the payment of the purchase-money into the *Bank of England*, should be valid to all intents and purposes.

Mr. *Thurlow*, on the 2nd of March, 1799, entered into a contract with *Ralph Meggeson*, for the sale to him of the said farm and the inheritance thereof in fee simple in possession, with the appurtenances, for £580. The requisite consents were obtained, and the contract was signed by Mr. *Thurlow*, *R. Meggeson*, and the commissioners.

After the date of the contract, and before the execution of the

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conveyance, the Act 39 Geo. 3, c. 21 (21st of March, 1799), came into operation. By that Act it was enacted (section 12), "That no mines or minerals, or seams or veins of coal, metals, or other profits of the like nature, belonging to any . . . . hereditaments which shall be sold by any bishop or other ecclesiastical corporation for the purpose of redeeming any land tax, whether the same shall be opened or unopened, nor any right . . . . to open or work the same . . . . shall pass by any conveyance of such . . . . hereditaments, either by express or general words in such conveyance . . . . and such mines or minerals, seams or veins of coal, metals, or other profits, ... shall be always absolutely excepted, and reserved to such bishop or other ecclesiastical corporations, as fully and effectually, to all intents and purposes, as if the same were, in such conveyance, expressly excepted and reserved . . . ." And it was also enacted (section 34), "That all and every the provisions of this Act shall, in the execution of the first recited Acts (c. 60, and c. 6, above mentioned) be used and applied, and continued in like manner as if the same provisions were specially enacted in the said Acts. . . ."

The purchase-money was paid into the *Bank of England*, to the account of the Commissioners for the Reduction of the National Debt, as required by the Acts c. 60, and c. 6, on the 12th of May, 1799. The deed of conveyance was dated the 15th of May, 1799; it recited the 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, and the payment of the purchase-money into the *Bank of England*, in compliance with the requisitions of those Acts; and the contract of the 2nd of March; and it then witnessed that Mr. *Thurlow* bargained and sold the *Water Furs Farm*, together with all rights, hereditaments, and appurtenances, to *Ralph Meggeson* and his heirs in fee. By the Acts recited there was no reservation of mines and minerals, neither was there any reservation in the conveyance.

R. Meggeson, who died in 1839, immediately after the date of the contract entered into possession of the farm, and the Plaintiffs, as his devisees under his will, dated the 3rd of June, 1833, still were in possession.

The Rev. *E. T. Thurlow* died in 1847, and the Defendant *Grey* was thereupon admitted to the rectory, and he, as rector, on the 7th of November, 1850, entered into an agreement with the

Defendant, the Earl of *Durham*, that he should work the coal mines under all the glebe and other lands belonging to the rectory, including specifically, and by name, all the coal mines under the *Water Furs Farm;* the earl, at the date of the agreement, being in possession of, and in the course of working the adjoining collieries. The agreement recited that the surface of the farm was sold and conveyed to *R. Meggeson* under certain Acts of Parliament, but with a reservation of the mines and minerals. The Plaintiffs alleged that such agreement was a cloud upon their title, and prayed (par. 1) for declarations that they were entitled to all the coal and other minerals under the farm, as part of the inheritance thereof; and that (par. 2), as against them the agreement of November, 1850, was void; for accounts; an injunction; and for costs.

The Defendant *Grey* insisted that the mines did not pass by the sale to *Meggeson*, and also went into evidence to shew that they were not intended to be sold. He stated that the Defendant, the Earl of *Durham*, had not worked any of the seams of coal under the farm; but he admitted that it was probable that the Earl would work them.

Mr. *Malins*, Q.C., and Mr. *Haddan*, for the Plaintiffs:—

It cannot be disputed that under the word appurtenances, in the conveyance, the mines passed, or that the contract was complete on the 2nd of March. The Act 39 Geo. 3, c. 21, s. 12, which reserved mines and minerals, applied to future contracts only, and not to contracts previously made under 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6. It cannot be held that all the preliminary consents obtained under c. 60 and c. 6, should go for nothing. The agreement between the Defendants is a cloud upon the Plaintiff's title, and ought to be delivered up and cancelled: *Hayward* v. *Dimsdale* (1).

Mr. *Daniel*, Q.C. (Mr. *Atkin* with him), for the Defendant *Grey*:—

The question is a legal one. No question of injunction arises, for there has been no real intention on the part of the Earl of *Durham*

(1) 17 Ves. 111.

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to work these mines. What happened between the 2nd of March, and the 15th of May, 1799, cannot now be known, as all the parties are dead; but it is certain that Mr. *Thurlow* lived and died in the belief that these mines never passed to the Plaintiffs' ancestor. The amount of the purchase-money is evidence of that belief, for it only gives about £15 an acre, and that was an absurdly low price for anything more than the surface.

There was no such sale under the Acts c. 60, and c. 6, as bound the inheritance, for until after the payment of the purchase-money into the *Bank of England*—which was a statutory requirement—there could be no sale under those Acts, and before the purchase-money was paid in, the statute, which reserved all mines and minerals, and also made the former Acts a part of that Act, was passed. At the time when c. 21 was passed, there was only an inchoate contract, and it is very clear, from the language of sects. 12 and 34 of that Act, that it was intended that in such a case the minerals should not pass, as by that Act contracts which had to be executed after it came into operation were incorporated with it. The Acts of 1798 contain certain restrictions in reference to the payment of the purchase-money into the *Bank of England*, and they were not complied with. The effect of the conveyance must be judged of by reference to c. 21, s. 34; and it is only after such reference that the true legal construction of all the three Acts can be arrived at.

Mr. *Greene*, Q.C., and Mr. *Dickinson*, Q.C., for the Earl of *Durham*.

SIR JOHN STUART, V.C.:—

"I think the Plaintiffs are clearly entitled to the declarations which they ask. The material question is upon the construction of the 12th section of 39 Geo. 3, c. 21, and it seems to me perfectly clear, from the repeated use of the word "shall" in that section, that it refers to sales made after the Act came into operation, and here the contract to purchase was entered into by the Plaintiff's ancestor before that Act was passed. It is not reasonable to presume that the statute passed after a binding contract was made, was intended to alter the terms of a binding contract.

It has been contended that the contract could have no operation until after the purchase-money was paid into the *Bank of England;* but the 31th section of c. 21, does not say that. It seems to me, that a vendor under the Acts of 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, would have the same rights as other vendors; and after the payment of the purchase-money, the purchaser would be entitled to have his contract completed by a conveyance in the ordinary manner. There is nothing to justify the contest that, because the purchase-money was not paid, and the conveyance not executed until after c. 21 came into operation, there was not a binding contract and a complete title in the purchaser to the minerals. As to the jurisdiction of this Court, it is to be observed that the bill prays for an injunction against the working of the mines, and that the answer of the Defendant *Grey* states that the Defendant the Earl of *Durham*, intends to work them. It would be according to the usual course of the Court to grant an injunction, and it is no objection that a legal question is involved, this Court being bound, under a recent Act of Parliament, to decide legal questions.

The Plaintiffs having proved their right to relief, there must be declarations in the terms of the 1st and 2nd paragraphs of the prayer, and a decree for an injunction against the Defendant *Grey*, and all persons claiming under him. The costs of the Earl of *Durham* must first be paid by the Plaintiffs, who must recover them with their own from the Defendant *Grey*.

Solicitors for the Plaintiffs: Messrs. *Bell, Brodrick, & Bell*, agents for Messrs. *Snowball & Allison, Sunderland.*

Solicitors for the Defendant *Grey*: Messrs. *Walters, Young, & Walters.*

Solicitors for the Earl of *Durham*: Messrs. *Shum & Crossman*, agents for Mr. *J. Kidson, Sunderland.*

V.-C. W.
1866
Nov. 19, 20.

ROSS *v.* ESTATES INVESTMENT COMPANY.

Company—Rectification of Register—Prospectus—Misrepresentation.

The prospectus, which was circulated after the incorporation of a limited company, commenced by stating, in prominent type, that more than half the first issue of 5000 shares had already been subscribed for, applications being invited for the "remaining shares," and that the company had contracted for the purchase of two properties, viz., *A.*, on which "upwards of £70,000 has already been expended by the vendor in buildings and improvements, in addition to the purchase-money paid by him for the land," and *B.*

It appeared that *S.*, who was the person engaged in getting up the company, had contracted to buy estate *A.* for the purpose of selling it to the company; but had not expended any money at all upon the estate, although £70,000, or some such sum, had been laid out by the persons from whom *S.* purchased. He had verbally agreed to purchase estate *B.*; but had not signed any written contract. Before the prospectus was issued, and while the terms of it were under discussion, *S.* signed an agreement by which he "subscribed for 2510 shares" in the company, and requested the directors to "allot that number to him or his nominees, in such manner as he might direct at the time of allotment." After the prospectus was issued, *S.*, by his agents, procured applications for shares (including 200 for himself), to an amount exceeding the 2500, or half of the first issue of 5000.

On a bill by one of these applicants (to whom ten shares were allotted), to set aside the allotment on the ground of fraudulent misrepresentations contained in the prospectus; (*a*), as to the subscription for more than half the first issue; (*b*), as to £70,000 having been expended by *S.* upon estate *A.*; and (*c*), as to there being any binding contract for the purchase of estate *B.*:—

Held, that there had been such an amount of misrepresentation upon (*a*), (*b*), and (*c*), by the directors, and by their authorized agent *S.*, for whose statements, having adopted and had the benefit of them, they were responsible, that any contract to take shares entered into on the faith of the prospectus, must be set aside.

THIS was a suit for the purpose of setting aside an allotment of ten shares made to the Plaintiff in the *Estates Investment Company, Limited*, and restraining proceedings in an action for calls, on the alleged grounds of untrue and fraudulent representations made by the directors in the prospectus; suppression of important facts from the shareholders; and (by amendment) material variance in the character and objects of the company, as defined by the memorandum of association, from those stated in the prospectus, on the faith of which the shares were taken.

Early in 1865 the Defendant *Sarl* was engaged in bringing out a company for the purpose of working and making available two building properties—one at *Norwood*, and the other near *Epping Forest*, the former of which estates he had actually contracted to purchase, while he had entered into a merely verbal agreement for the purchase of the latter.

The company, which was thus formed to a great extent at the instance and through the exertions of the Defendant *Sarl*, who undertook to pay all preliminary expenses, and to make himself responsible for 2500 shares, was registered on the 15th of February, 1865, as a limited company, with a nominal capital of £250,000, divided into 10,000 shares of £25 each.

According to the memorandum of association, the objects for which the company was established were:—

"(*a*). The purchasing or otherwise acquiring and holding of the *Selhurst Park* estate, at *Norwood*, in the county of *Surrey*, the *Firebrook* estate, at *Leytonstone*, in the county of *Essex*, and other lands and hereditaments, of any tenure, in *England* or elsewhere, and the selling, letting, alienating, estranging, mortgaging, charging, or otherwise dealing with, all or any of such lands or hereditaments.

"(*b*). The construction and erection, either by the company or other parties, of sewers, roads, streets, gasworks, waterworks, brick kilns, brick houses, buildings, and all other works and things of any and every description whatsoever, either upon the lands acquired by the company, or upon any other lands.

"(*c*). The promoting of any enterprise, whether by individuals or associations, which shall have for its object the making or doing, or aiding in making or doing, all or any works or things which it shall seem expedient to the company to have made or done.

"(*d*). The lending or advancing money to builders, and other persons, on securities of all descriptions, whether real or personal.

"(*e*). The doing of all such matters and things as shall be incidental or auxiliary to the attainment of the above objects, or any or either of them, or that may appear to the company to be conducive thereto, or expedient to be done or carried on in connection therewith."

At a meeting of the board held on the 12th of April, 1865, the directors, having been furnished with a report by Messrs. *Driver &*

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Co. of their survey of the *Norwood* and *Leytonstone* properties, and, being satisfied with the report and explanations given, agreed to purchase those estates for £105,000 and £45,000, from *Sarl*, who was in possession of a contract, dated the 3rd of December, 1864, for the purchase of the *Selhurst Park* estate for £95,000, and had verbally (but without any signed contract) agreed to buy the *Leytonstone* estate for £45,000. The seal of the company was affixed to the agreement, and the solicitor was instructed (with the consent of Mr. *Sarl*) to hold over the agreements until after an allotment; if no allotment took place, the agreements to become null and void, and if allotment took place the agreements were to be then exchanged. The terms of the prospectus, which was prepared, but had not been then issued, were then discussed, and on coming to the statement that more than one-half of the first issue of shares had been subscribed, one of the directors asked who it was that had agreed to take that amount. It was answered that *Sarl* (who, as has been already stated, had agreed to subscribe for 2510 shares, stipulating that they should be allotted to him or his nominees as he should direct) was the man. As this agreement was not in writing, the following document was then (as stated by the directors in their answer) drawn up and signed by *Sarl*:—

"Gentlemen,—I hereby subscribe for two thousand five hundred and ten shares (2510) in above company, and I request that you will allot that number to me, or my nominees to be hereafter named, in such manner as I may direct at the time of allotment.

"*London*, 12th April, 1865."

The prospectus, which was issued early in May, was, so far as is material, in the following terms:—

The *Estates Investment Company, Limited.*

Incorporated under "The *Companies Act*, 1862."

Capital £250,000, in 10,000 shares of £25 each.
£1 to be paid on application, and £4 on allotment.
First issue 5000 shares.
OF WHICH MORE THAN HALF HAS BEEN SUBSCRIBED.
No call will exceed £5 per share.

After giving the names of the directors, bankers, and solicitors, &c., the prospectus thus proceeded:—

"The objects for which this company has been established are the purchase, or otherwise acquiring from time to time, of lands suitable for the erection of mansions, villas, and every other description of buildings, in the vicinity of the Metropolis and elsewhere, and for the letting or resale of such lands for building and other purposes; also to grant loans and make advances to purchasers and lessees of such lands, to respectable builders, and other persons, for any purposes incidental to the objects of the company. The *Estates Investment Company* has contracted for the purchase of the under-mentioned well-known estates, which, for importance of locality, cannot be surpassed, viz.:—

"No. 1. This is a freehold estate at *South Norwood* known as the *Selhurst Park* estate. It is within three minutes' walk of the *Norwood Junction Station*, fifteen minutes' ride of *London*, and three minutes' ride of the *Crystal Palace*. A portion of the estate is covered with first class villa residences, all let to highly respectable tenants. Upwards of £70,000 has already been expended upon this estate by the vendor in buildings and improvements, in addition to the purchase-money paid by him for the land, &c.

"No. 2. This is a freehold estate, situated in the highly picturesque neighbourhood of *Leytonstone*, within six miles of *London*, and within one minute's walk of the *Leytonstone Station* on the *Great Eastern Railway*, the *London* terminus of which will be in *Broad Street*, in the heart of the *City*. This estate comprises upwards of 100 acres of very valuable land of an undulating character, admirably adapted for the erection of first-class residences, the whole lying within a ring-fence, &c. The price to be paid for these estates, including the houses already built, is £150,000, of which £50,000 is to be paid in cash, and the remainder may, if desired by the company, remain on mortgage at 4½ per cent.

"Previous to these contracts being made these estates were surveyed and valued by Messrs. *Driver*, the well-known surveyors and land agents of *Whitehall*, and it appears from their report, which may be seen at the offices of the company, that the value of these estates to be realized by the company may be fairly estimated

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at £273,000, shewing a profit of upwards of 30 per cent., with an estimated income equal to 11 per cent. on the cost price.

"In addition to these there are other very eligible estates, in close proximity to the *Brighton* and other lines of railway, for the purchase of which negotiations are pending.

"More than half the first issue of the shares has been already subscribed for, and applications for the remaining shares must be made in the annexed form, accompanied by a deposit of £1 per share."

The prospectus was issued early in May, 1865, and on the 23rd of that month the directors allotted the whole of the first issue of 5000 shares. Of these 5000, 2776 were allotted to persons who were nominees of *Sarl*, or had been induced by his exertions to apply for shares. His own application was limited to 200 shares, and the directors seem to have considered that there had been a sufficient compliance with the statement prominently contained in the prospectus and his written engagement. The statement in their answer upon this point was:—"Having had a larger number of applications than we could satisfy, it was unnecessary for us strictly to require *Sarl* to comply with his engagement of the 12th of April, 1865, or to take up by himself, or his nominees, the full number of 2510 shares, nor did we care to inquire how many, or who, amongst the applicants, were, or could be considered, as his nominees, or acting at his instance, and we cannot now make any definite statement on the subject. He did not insist on the board giving to him, or his nominees, the full number of 2510 shares, although at that time the shares were selling in the market at £3 premium."

Sarl, by his answer, made the following statement upon this point:—

"I made great exertions to secure a large number of applications for shares, and I employed brokers for the purpose, and I believe that a very large number of applications was sent in consequence, and I considered that I was thereby satisfying, and that I did thereby completely satisfy, my aforesaid liability to take the said 2510 shares. I also applied for 200 shares for myself, because I concluded that the said 2510 shares would be allotted to the

persons whom I so as aforesaid considered my nominees. I was allotted 100 only of the said 200 shares."

The 2776 shares, which were allotted by the exertions of *Sarl* and persons employed by him in "placing out" the shares, were divided out into four lists, which contained the names of the allottees and the numbers of the shares. These lists were furnished by *Sarl* and three other persons, who were brokers or agents of the company, the names of six out of the seven directors being included in *Sarl's* list.

The Plaintiff, upon seeing the prospectus in May, 1865, was induced, upon the faith of the statements therein contained, to apply for ten shares in the company, being, as he stated, under the impression that, according to the representations therein contained, one-half of the first issue of 5,000 shares had been then already subscribed for and taken by *bonâ fide* shareholders of the company, and that his ten shares would be allotted to him out of the remaining shares. In point of fact, however, the ten shares allotted to the Plaintiff were included in the lists of 2776 shares sent in by *Sarl* and his agents.

The shares, which when taken by the Plaintiff were at £3 premium, rapidly fell in the market, and the Plaintiff finding himself unable to dispose of them, except at a considerable loss, made inquiries, the result of which led him to institute this suit for the purpose of being relieved from his shares on the ground of misrepresentation contained in the statements put forward by the directors in their prospectus, and suppression and concealment of material facts.

The case made by the bill was:—

(1.) That at the time when the prospectus was issued, and when the Plaintiff applied for ten shares, no part of the first moiety of the first issue of shares stated and represented in the prospectus to be subscribed for, had been in truth or *bonâ fide* subscribed for, and that no shares at all had been in fact allotted in the company; so that the representation in the prospectus (in large type, and the only words printed in red ink) was wholly untrue, and the document signed by *Sarl* was a mere illusory and secret arrangement between him and the company and some of the directors, in order to give some pretence for such representation.

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(2.) That *Sarl* was a man of little or no means, and that the representation in the prospectus that upwards of £70,000 had then already been expended upon the *Selhurst Park* estate by the vendor (*Sarl*) in addition to the purchase-money paid by him for the land, was untrue; no such sum having in fact been expended by *Sarl*, or, to the Plaintiff's knowledge, by any other person.

(3.) That no complete binding contract had been entered into for the purchase of the *Leytonstone* estate, and that the statement to this effect contained in the prospectus was untrue, and untrue to the knowledge of the directors.

(4.) That the directors had wilfully suppressed the fact that a bonus of £10,000 was to be received by *Sarl* in addition to the price for which he had agreed to purchase the *Selhurst Park* estate, and that the alleged contract between him and the company for the sale to them of this property, was a mere contrivance for securing £10,000 to *Sarl* as a bonus or promotion money to him and the other persons who assisted in getting up the company and framing the prospectus.

A minor point was also raised, that of the directors named in the prospectus, one of them (*Key*) whose name was well known in the *City*, and had materially influenced the Plaintiff in applying for shares, never was a director and never had any shares in the company. It appeared, however, that Mr. *Key* had agreed to become a director and had sent in an application, but did not get his shares from not having done so within the time limited.

The bill further charged (by amendment), that in addition to the misrepresentations in the prospectus with reference to the purchase of the estates, and the pretended subscription of shares, the objects of the company as defined by the memorandum of association differed so materially from those mentioned in the prospectus as to render it in character a different company from that represented in the prospectus, on the faith of which Plaintiff applied for shares.

The bill also charged that the Defendants, other than the company, or some of them, were parties to the issuing of the prospectus, and the misstatements thereby made, and were well aware of the real facts of the case, and of the untrue statements and representations, and of the improper suppressions, in the prospectus, and that

they were, therefore, at all events, liable, as well as the company, to pay the costs of the suit, and to repay the deposit paid by the Plaintiff upon his shares.

The directors, in their answer, insisted that the prospectus was issued with perfect *bona fides*, and denied that there were any untrue statements or representations, or any improper suppressions therein. They stated that at the time of signing the agreement for purchasing the estates from *Sarl*, they none of them knew the state of the title, or how much *Sarl* had given or agreed for either of the estates, or whether he would make any profit by his sales, but that they believed, from the report of Messrs *Driver*, the surveyors, that the price to be paid by the company was fair and reasonable, and that the purchase would prove a good speculation. They denied that a bonus, or anything in the nature of a bonus, was given or promised to *Sarl*, or that the transaction was in any respect other than an ordinary *bonâ fide* contract between vendor and purchaser. This statement was reiterated by *Sarl* in his answer, who admitted that no such sum as £70,000 had been expended by him upon the *Selhurst Park* estate, but denied that the representation was untrue, and added, "I have been informed, and believe, that the persons who sold the *Selhurst Park* estate to me had themselves, or by their lessees, expended £70,000 and upwards upon buildings and improvement thereon, and I believe that in making the statement on that subject in the said prospectus the directors intended to refer to them."

With respect to the *Leytonstone* estate, the Defendant *Sarl* stated that "the agreement was not actually signed by the parties thereto, but it was completely entered into, and the draft was approved by the solicitors on both sides, and signed by them in token of such approval, and was (as he believed) completely binding, and the said Mr. *Sanson*, the owner, was for some time after the formation of the company, very pressing to have the purchase of his estate completed."

Under these circumstances the directors and *Sarl* submitted whether it was or not the fact, that no complete binding contract had ever been entered into for the purchase of the *Leytonstone* estate, either at the time when the prospectus was issued or when Plaintiff applied for shares.

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The account given by the directors and *Sarl* of the share transactions impeached by the bill has been already stated.

The *Attorney-General* (Sir *John Rolt*), Mr. *Daniel*, Q.C., and Mr. *Everitt*, for the Plaintiff, contended that he was entitled to be relieved from his shares in consequence of the gross and fraudulent misrepresentations put forward by the directors, or, at all events, with their sanction, in their prospectus, on the faith of which the shares were taken: *Kisch* v. *Central Railway Company of Venezuela* (1); *Re Life Association of England, Blake's Case* (2). Even if the directors did not actually know that the representations made by *Sarl*, as to the expenditure upon the *Selhurst Park* estate, and the existence of a contract for the purchase of the *Leytonstone* estate, were untrue, he was their agent, and his acts had been adopted by them, and they must bear all the consequences of his misrepresentations; *Rawlins* v. *Wickham* (3): while, at any rate, they were fully cognisant of the facts as to the alleged issue of shares, and that the statement in the prospectus, which was expressly designed to attract applications, was a positive falsehood. Independently of the misrepresentations contained in the prospectus, there were such wide variations between the objects of the company as stated in the prospectus, and those included in the memorandum of association, in particular in the clause by which the directors were authorized to turn themselves into a loan company by "lending or advancing money to builders, and other persons, on securities of all descriptions, whether real or personal," and in that which authorized "the promoting of any enterprise, whether by individuals or associations," that the Plaintiff who took his shares upon the faith of the prospectus, and was at the time ignorant of the contents of the memorandum, was entitled to have his allotment of shares cancelled, and to be removed from the register of the company: *Ship's Case* (4); *Stewart's Case* (5).

Mr. *G. M. Giffard*, Q.C., and Mr. *Cracknall*, (Mr. *Surrage* with them) for the directors of the company, contended that in order

(1) 3 D. J. & S. 122. 11 Jur. N.S. 646. (4) 2 D. J. & S. 544; 13 W. R. 450, 599. 11 Jur. N.S. 331.
(2) 13 W. R. 486. 11 Jur. N.S. 859.
(3) 3 De G. & J. 304. 5 Jur. N.S. 278
(5) Law Rep. 1 Ch. 574.

to set aside an allotment of shares on the ground of concealment and fraudulent misrepresentation, the *scienter* must be clearly and decisively proved against the directors as principals, and proof of misrepresentation, or suppression of important facts, by *Sarl*, even assuming him to have been the agent of the directors, would not be sufficient to avoid the contract: *Attwood* v. *Small* (1); *Wilde* v. *Gibson* (2). But what did the misrepresentations of the prospectus amount to, and how had the Plaintiff been injured by them? At worst, there had been *damnum sine injuriâ*, and no damages could be recovered by him at law. Mr. *Sarl* had literally, and in truth, subscribed for 2500 shares, and there was nothing either in his contract, or in the statement contained in the prospectus, binding him personally to take this amount. His engagement was sufficiently complied with if he got this number taken by *bonâ fide* allottees, and this was what had been done. With respect to the *Selhurst Park* estate, and the alleged bonus of £10,000 to *Sarl*, the directors swore positively that they had not agreed to give him that or any other sum by way of bonus, and, after all, the material fact was, what price the company had given, and not the amount of purchase-money paid by *Sarl*. Even assuming that in the statement as to the expenditure of £70,000, the word "vendor" must be taken as referring to *Sarl*, and not to the persons selling to him; how could such a misstatement affect the shareholders? They got, as they were told they would, an estate upon which £70,000 had recently been expended, and it was immaterial whether that money was laid out by *Sarl* or the vendors to him, the actual benefit to the property being the same in either case. With respect to the *Leytonstone* property, the directors had entered into a binding contract with Mr. *Sarl*, which they could have compelled him to perform, or for the breach of which they could have compelled him to give them compensation. Upon the whole, it was submitted that the prospectus fairly represented the scope and objects of the company in all material particulars, and—"It is not because a prospectus contains exaggerated views of the advantages of the company to which it relates, or contains some casual or trifling errors or inaccuracies, that this Court would be justified in setting aside a bargain founded upon it:" *Kisch* v. *Central*

(1) 6 Cl. & Fin. 232 (see pp. 330, 395, 444). (2) 1 H. L. C. 605.

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Railway Company of Venezuela (1). Applying the tests there stated, the Plaintiff had failed to establish any case for relief on the ground of misrepresentation, or suppression in the prospectus. As to any alleged variance between the prospectus and the memorandum, the case differed entirely from *Ship's Case*, and *Stewart's Case*, the essence of those cases being, that the memorandum and articles of association were issued subsequently to the prospectus on the faith of which the shares were taken, whereas here the prospectus was issued after the incorporation of the company and registration of the memorandum; and persons seeing the prospectus, in which this fact was prominently stated, would be affected with notice, and bound by all the contents of the memorandum and articles of association. But, at all events, as the Plaintiff had rested his case upon the personal fraud of the directors and failed to establish it, no relief could be obtained by him upon such a bill.

Mr. *Kay*, for the Defendant *Sarl*.

SIR W. PAGE WOOD, V.C.:—

I think the Plaintiff is entitled to be relieved from this contract. The question is, how far the Plaintiff has had made to him that which he is entitled to regard as a fraudulent misrepresentation, in the prospectus, of the position of the company which he was invited to join. I do not deal with the alleged discrepancy between the objects as represented in the prospectus and in the memorandum and articles of association. On that part of the case I should have heard a reply, if I had entertained more doubt than I do upon that which is principally alleged in the original bill, because I think that a great distinction must be drawn between those cases where persons have subscribed on the faith of a prospectus to a company whose memorandum has been already registered and its objects ascertained, and those where they are invited to join by a prospectus, and the memorandum is afterwards framed upon a totally different scheme. That part of the case I put aside. I also at once put aside the question as to the £10,000

(1) 3 D. J. & S. 135.

bonus to be given to the promoter. This bonus is undoubtedly not mentioned in the prospectus, but as the directors have sworn that they did not know the price that had been given by *Sarl* for the property in question, or the amount of the bonus to be realized by him, I ought not in justice to them to suppose them to have known a fact as to which I do not find anything established against them. I also pass by the point as to Mr. *Key* having been named as a director, for although the Plaintiff might be led into a mistake seeing that he had taken no shares whatever, yet it appears that he had agreed to act as director, and did apply, but too late, for shares. I shall therefore confine the observations I have to make to the representations as to the shares and the purchase of the two estates.

Now it is very important, before criticising the prospectus, to know the exact position in which these parties stood, and then contrast it with the position described in the prospectus, both as to the shares and the estates.

First, we have this fact, that *Sarl* was not merely what is technically called a promoter, which means nothing more than a man who is to have a large bonus given to him for having struck out the idea of forming the company; but he was in substance the promoter, and must be taken throughout the whole of this transaction as the recognised agent of the directors. It is established by the answer, as between him and the directors, that they looked upon him as the person who took charge of the whole formation of the company, who was to pay all the expenses if it failed (thus enabling the directors in their prospectus to say that the deposit should be returned in full if the shares were not allotted) and as the principal mover in the company. Further than this, he had agreed to place out, or, in other words, to make himself personally responsible for, one-half of the first issue of shares. He was promoter therefore in this sense, that he was the principal author of the company, the person who advised and was mainly engaged in circulating the prospectus, and who had agreed to place one-fourth of the whole of the shares.

With respect to the two properties described in the prospectus, he had bought the *Selhurst Park* estate for £95,000, I have assumed that the price was unknown to the directors, and he had

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done nothing more, he had not laid out a sixpence upon it. He had entered into a verbal contract for the *Leytonstone* estate, but there was no binding contract until some agreement was signed. It was a mere speculation between himself and the vendor, contingent upon the company being got up, but he knew perfectly well that he was not the owner of the estate. That was his position with regard to the two estates. If the project failed, *Sarl* was to pay all expenses, and all agreements were to be at an end as between him and the company. He also undertook to place out and make himself personally responsible for 2500 shares, the directors on their part entering into contracts binding them to buy these two estates, one of which he had and the other he had not. These estates were not to be actually bought, but the contracts for them were to be held as escrows until the company was fairly afloat. Having come to this arrangement they issue the prospectus.

I must take *Sarl* throughout to have been an agent of the directors in the concern, and it is impossible for them to escape from the representations made by him for their benefit and on their behalf, or to say that they are not bound by them. The representation in the prospectus, that more than one-half of the shares had been already subscribed, being printed in large type at the head of the prospectus, and in red ink, was evidently meant to be a very important representation, and to have weight with all those who might apply for shares. It was further stated at the end of the prospectus:—"More than half the first issue of shares has been already subscribed for," and again "applications for the *remaining* shares must be made in the annexed form. [His Honour, after stating the proceedings at the meeting of the 12th of April, 1865, continued]:—What one has to consider is, whether it is a fair representation to tell the public in this prominent manner that more than one-half of the shares has been subscribed. Is it not a distinct and plain representation that the directors have not 5000 shares at their disposal, that 2500 of them have been got rid of; that they are gone, and that the public, if they wish to get those that remain, must be quick and prompt in their applications, otherwise they will not be in time. In a sense the directors had not 5000 shares

at their disposal, because *Sarl*, who had entered into this engagement, might, if the thing had become very profitable, from the rise of shares or otherwise, have turned round and said, "They are not at your disposal; I have entered into a contract to take them. They are my shares, and my shares they must remain." Still the matter was in this position; that if the thing failed and broke down, *Sarl* was under no risk or responsibility beyond having to pay £1500 for the expenses incurred in forming the company. He was the person to set it afloat, and send it into the market, and the person to frame the prospectus, and see how people could be introduced into the concern. If it failed, he might as well say that he would take 5000 as 2500 shares, as he would not have to take any at all. Then we find *Sarl* pushing these 2500 shares into the market immediately, and in fact part of the arrangement was, as his friend *Spratt* says, that he should place them so that the public might believe they were bidding for the reserve of 2500 shares, and that there would be allotted to them a valuable property in which a large investment had been actually made; that it was not a mere speculative concern, but a very valuable property, on which £70,000 has been spent beyond the actual purchase-money for the land. The prospectus represents the speculation as so attractive already, that 2500 shares had been taken up, and the public are invited to rush in as fast as they can to bid for the remaining half of the first issue of shares in so valuable a concern. Plainly that is the meaning of the whole transaction, and it is not the way in which these transactions should be conducted. It is true to the letter, by just putting in ten extra shares to make it more than half the 5000, the public not knowing how much that might or might not be beyond the actual half of the shares. It is just sailing within the very limits of truth in every way. It was a contrivance and device by which persons might be induced to take shares in the market under a representation which, although it keeps the strict letter, is necessarily calculated, and obviously intended, to mislead and deceive those who applied for the shares. It is quite true that if *Sarl* had taken them all he might have sold them. But that would put matters in a very different position from what they were in from such a representation as is here complained of, as the moment it was found that shares subscribed for and taken were being sold, it would have its own

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proper influence upon the market. I cannot call it an honest representation, and it is not the less a misrepresentation because there is some degree of literal truth in the statement that is put forward. In all these transactions it is essential that there should be *uberrima fides*—a most complete disclosure of the facts—on the part of those who induce the public to invest their money. I do not forget the observations of Lord Justice *Turner* in the case that has been referred to, *Kisch* v. *Central Railway Company of Venezuela* (1); but I am sure he would be the last person to hold that it was competent for any one in a prospectus, or any other document, to put forward a statement that was substantially untrue, or calculated to mislead. What the Lord Justice said, was, that looking at the character of the thing called a prospectus, it was very much like an auctioneer's catalogue, inasmuch as a man cannot get rid of a contract because all the numerous prospective advantages likely to accrue to the estate, according to the sanguine views of the projectors, may not be realised. But mere exaggeration is a totally different thing from a misrepresentation of any precise or definite fact, as to which there must be *uberrima fides* on the part of the contractors. It appeared to me from the first, therefore, that there was a serious ground for impeaching this contract.

Then, with respect to the purchase of the *Selhurst Park* estate, it was announced specifically that "upwards of £70,000 has already been expended on this estate by the vendor in buildings and improvements, in addition to the purchase-money paid by him for the land." This is a representation, and so it is charged prominently in the bill, that *Sarl*, being the vendor, has spent £70,000 upon the land, whereas "no such sum in fact has been spent by the Defendant *William Sarl*, or, so far as the Plaintiff knows, by any other person." The answer to this is: "I quite admit that I never did spend a farthing upon it—I believe the former owner and his lessee did spend as much money upon it." But the representation is that the "vendor" had done so; not that somebody, perhaps one hundred years ago, spent that money upon it, but that the man who had just sold and parted with it, is the man who spent that money upon the estate, besides what he paid

(1) 3 D. J. & S. 122: 11 Jur. N.S. 648.

as purchase-money. It was said, and ingeniously said, that the directors had not told the public what the purchase-money was, and therefore, that they are not the worse for that representation. But what they do tell the public is, that the very man who has parted with the estate to them, the recent owner, is so aware of the value of the property, as regards its position for building purposes, that he has recently expended £70,000 upon it. There is an admission upon the answer that this was simply and plainly untrue. It is a positive falsehood put in on *Sarl's* part. The directors made themselves parties to this representation, and they cannot escape from the consequences, or hold themselves free as to those who enter into compacts with them on the faith of this representation, by saying that the man to whom they intrusted the making up of this prospectus has been telling a deliberate falsehood as to the state of the property. With respect to the *Leytonstone* estate, I am very glad to be able to absolve the directors from anything worse than carelessness. They enter into a contract with *Sarl* for the purchase of the second estate, and I think it is very possible that persons who enter into contracts do not know the anterior title. They say they did not know what the title was, and that they did not know that *Sarl* was not the owner. *Sarl*, however, at all events, knew that there was no agreement in writing for the purchase of this estate, and that he was not the owner of the estate in any sense, and he had no business to tell the public, when he was about to place out the shares, that the estate was bought. It is true that there was a verbal contract, but he must have known the reason why it remained verbal, which was, that the possible vendor did not choose to make it a positive agreement, for what other reason is there for a man not signing an agreement except that he does not choose to be bound. The nearer it came to a contract, the more clear and plain it was to *Sarl* that the vendor did not choose to be bound to him, and he allowed this statement to go forth, when he knew that he could make no title to the estate whatever. As to the directors, I should have expected before a document of this kind went out to the public, that they would have inquired about his title, and whether he had possession of a single acre of the property, but, as I said before, I am most willing to acquit them of the slightest intentional deception in making this representation, they having contracted with *Sarl*,

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and *Sarl* having represented to them that he had got the property. I find, then, what I hold to be a complete misrepresentation as to the issue of the shares, while with reference to the £70,000 expenditure upon the *Selhurst* property, there is a plain and positive misrepresentation of the grossest kind, and a misrepresentation also as to there being a purchase of the second property, which *Sarl* was not owner of, and had not in any way the power of disposing of. It is said, however, that although the Plaintiff might succeed in setting aside the contract, on the ground of his being misled by errors of this description, yet as he has charged direct and positive fraud against the directors, he ought not to be relieved, but have his bill dismissed with costs, I apprehend that if the directors choose to act upon the representations made by their agent (who was the main promoter of the company, the issuer of the prospectus, and the person to bear all the expenses if the thing failed) they must be fixed with all the consequences of the transaction, just as if they had themselves borne a part in it. With regard to the shares, I think there is something more. They knew as well as *Sarl* what the nature of the transaction was, and it was with full knowledge that they issued that which I hold to be a misrepresentation. Whatever delusions these gentlemen may have been labouring under, and men have been so debauched by the transactions of these companies that they do labour under grievous delusion as to what moral propriety requires, I think they will not, on reflection, consider that they were justified in holding out to the public, in these simple words, that 2500 shares had been subscribed for, and therefore that application could be made for the remainder only; the fact being, that they had only contracted with a man to place these shares, he never having had the slightest intention of taking that amount of shares, or anything like it. But it was a part of the general speculation that applications for shares were to be obtained; that this document should be signed, and that he should make it part of his business to set the whole thing afloat, and to place these shares out so that it should be afterwards represented to the public that he was somebody who had actually subscribed for the shares. On that part of the case I cannot acquit them of doing what is not consistent, as it appears to me, with the high principles of good faith that ought to

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regulate affairs of this kind. I wish to draw a broad line of distinction between *Sarl* and the directors, with regard to the two contracts in which they have been deceived rather than deceivers. Upon the question of the shares alone, however, the Plaintiff would be entitled to succeed, and the directors must be fixed with the consequence of the misrepresentations that have been made.

MINUTE:—Declare that the Plaintiff is entitled to have the contract entered into by him for the purchase of ten shares in the Defendant's company set aside in respect of the misrepresentations contained in the prospectus of the company, on the faith of which he made his application for such shares; such misreprentation having relation to the amount of shares alleged to have been subscribed for, and the statement as to the purchase of the two several properties, *Selhurst* and *Leytonstone*. Direct the Defendants to repay the deposit of £10 paid by Plaintiff for the shares, and Defendants, the directors, to cause the Plaintiff's name to be removed from the register of the company. Restrain the company from proceeding in the action, with a perpetual injunction against such action. Order all the Defendants to pay the costs of suit.

Solicitors: Mr. *Henry Harris;* Messrs. *Wilkinson, Stevens, & Wilkinson.*

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Bill by Company impeaching Transactions of Directors—Ultrà Vires—Concealment—Demurrer.

Where a bill was filed by the official liquidator of a company against its late directors, stating a transaction whereby, in consideration of the payment of moneys belonging to the company by means of cheques drawn by two of the directors, certain shares in a banking company were transferred into the names of some of the directors as nominees of the company, and alleging that this transaction was *ultrà vires*, and was concealed from the company by false descriptions in the company's books:—

Held, on demurrer by one of the Defendants, that whatever might be the force of the argument as to the validity of the transaction under the company's powers, the charges in the bill as to concealment must be answered; and demurrer overruled.

THIS was a demurrer.

The bill was filed by the *Joint Stock Discount Company Limited*, by its official liquidator, against *William Charles Brown* and

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fourteen other persons, late the directors, secretary, and assistant manager of the company, stating its incorporation on the 21st of February, 1863, with a memorandum and articles of association, the former of which contained the following clause :—

3. "The objects for which the company is established are the carrying on the business of a bill-broker and scrivener; the drawing, accepting, endorsing, discounting, and re-discounting bills of exchange and promissory notes; the making advances and procuring loans on, and the investing in, securities; the borrowing and lending of money; the guaranteeing payment of bills of exchange, promissory notes, and advances; and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects."

The capital of the company was £1,000,000, divided into 40,000 shares of £25 each; and by the articles of association, an agreement was confirmed, dated the 7th of February preceding, and made between ten of the Defendants, on behalf of the intended company, of the one part, and another Defendant, *James Freeling Wilkinson*, bill-broker and money-dealer, of the other part, whereby it was agreed that *Wilkinson* should sell and transfer, as far as he was enabled so to do, his business of a bill-broker and money-dealer to the company, and that the company should re-discount at reasonable rates for, and on the guarantee of *Wilkinson*, as many as he might require of his customer's bills, discounted by him and running at the date of the transfer.

The bill stated the incorporation on the 27th of June, 1865, of a joint stock company, called *Barned's Banking Company, Limited*, for the purpose of acquiring the business of two old-established banking firms of *J. Barned & Co.* and *Mozley & Co.*, at *Liverpool*, and alleged as follows:—

"The business of bankers is, and is well known and recognised as being, wholly distinct and separate from the business of a discount company."

"The directors of the Plaintiff company at or about the date of the incorporation of *Barned's Banking Company*, without any authority from the company in that behalf, entered into negotiations with *Barned's Banking Company* for an allotment, and

obtained allotments of shares in that company as hereinafter mentioned."

The bill then stated, that at a board meeting, held on the 19th of June, 1865, the following resolution was passed by the directors:—

"Resolved—

"That as the board consider that the formation of a limited joint stock bank on the basis of the absorption of the old firm of Messrs. *J. Barned & Co.*, of *Liverpool*, will be most conducive to the interests of the company by increasing its connections, the company, or its nominees, assist the same by applying for 10,000 shares in the proposed bank on the terms above stated."

The purport of this resolution having been communicated to *J. Barned & Co.*, they wrote to the directors as follows:—

"21st June, 1865.

"To the *Joint Stock Discount Company.*

"Gentlemen,—In consideration of your applying, either directly or through your nominees, for 10,000 shares in the proposed *Barned's Banking Company, Limited*, we undertake, within three months from this date, to pay you £10,000 in cash, or, at our option, in shares of the bank at par, having not less than £10, nor more than £20, paid upon each share. It is also understood that of the 10,000 shares so to be applied for, you shall not be bound to take more than two-sevenths of the company that may not be allotted to the public, and that you shall have the option of taking not exceeding 2000 of such shares, even if the entire capital, or beyond, be applied for by the public.

"We are, &c.,

"(Signed) *J. Barned & Co.*"

The bill went on to state that on the 26th of June a cheque for £10,000 upon the company's bankers was signed by two of the Defendants, and sent to *Barned's Banking Company*, on account of 3000 shares in the latter company, which were to be allotted to seven of the Defendants (not including the Defendant *Brown*), *Wilkinson* holding 600 shares, three of the others 500 each, and the remaining three 300 each. On the 24th of July, *Barned's*

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Company wrote to say that, with reference to the bonus of £10,000 for taking 10,000 shares, as the *Joint Stock Discount Company* now desired to limit their interest to 3000 shares, "in order to meet your company's wishes, 3000 shares have been allotted their nominees, being less than half the number which they were otherwise bound to accept, but, in consideration of such reduced allotment, the bonus to be paid to your company is reduced to £5000, or 250 shares, £20 paid up; it being, moreover, clearly understood that the 3000 shares are to be dealt with in such a way as will not militate against the interests of the bank." Accordingly, another cheque for £5000 was drawn by two of the Defendants on the company's bankers, and sent to *Barned's Company*; and on the 2nd of September, 1865, a third cheque for £15,000 was drawn by two of the Defendants on the company's bankers, and sent to *Barned's Company*. The Defendants alleged, that of these three sums, the two former were paid in satisfaction of a first call of £5 per share on the 3000 shares, and that the further sum of £15,000 was paid in satisfaction of a second call of like amount.

The bill then went on to allege that an arrangement was come to between the directors and the seven Defendants, into whose names the 3000 shares were allotted, that the latter should severally sign an application for the said shares upon receiving from the directors the following letter:—

"Private and Confidential.

"The *Joint Stock Discount Company, Limited.*

"6 and 7, *Nicholas Lane, Lombard Street,*

"*London, E.C.,*

"Secretary's Office.

"Sir,—In consideration of your applying, on behalf of this company, for shares in *Barned's Banking Company, Limited,* we hereby undertake to pay the deposits on such shares, both on application and allotment, to pay all future calls, and to indemnify you against all liability you may incur in respect of such application.

"Please to return me, with the application, the letter on the other side, signed by yourself.

"I am, Sirs, yours obediently,

"For the *Joint Stock Discount Company, Limited.*"

That in further pursuance of such arrangement, the seven Defendants severally signed and handed to the directors forms of application for the said 3000 shares, together with a letter as follows:—

"To be returned signed with the application for shares.

"Private and Confidential.

"To the *Joint Stock Discount Company, Limited,*

"6 & 7, *Nicholas Lane, London,*

"———, 186—.

"Gentlemen,—I beg to enclose you a form of application for shares in *Barned's Banking Company, Limited,* which I have signed in my own name, but, at your request, on your account, and under your indemnity, and I agree to hold any shares that may be allotted to me in trust for you, and to transfer them, whenever required, to you, or your nominee or nominees.

"Yours obediently."

The applications referred to were applications by the seven directors above mentioned, and the 3000 shares were, in December, 1865, allotted and registered in the names of the same seven persons.

On the 29th of December, 1865, the secretary wrote to *Barned's Company* as follows:—

"*London,* 29th December, 1865.

"Messrs. *Barned & Co.*

"Dear Sirs,—I am instructed by the directors to write to you that, in consideration of your handing to the company at once the 500 (1) bonus shares of £10, paid in *Barned's Banking Company,* this company will agree not to sell any of their shares in the bank under £2 premium before the 1st of July, 1866, and that this company will, if the directors see no objection, at that date, extend the restriction from sale for a further period of six months. Please, therefore, send me, per return of post, as arranged, the share certificates and transfer for the said 500 shares.

"*Henry Joseph Westrup.*"

(1) 500 bonus shares at £10 seem to have been substituted for 250 at £20; but there was no allegation as to this.

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The 500 bonus shares were, in the course of the month of January, 1866, registered in the names of the Defendants, *William Chapman Harnett* and *Henry Joseph Westrup*, and on the 8th of June, 1866, the directors, at a board meeting, passed the following resolution:—

"That, in consideration of Messrs. *J. Barned & Co.* handing the company at once the 500 bonus shares in *Barned's Banking Company*, this company agrees not to sell any of their shares in the bank under £2 per share premium before July 1st, 1866, and will, if the directors have no objection, at that date extend the restrictions for sale for a further six months."

The bill then alleged as follows:—

Par. 42. "The directors had no power or authority to take or accept the said 3000 shares, or any shares whatever, in *Barned's Banking Company*, on behalf of the Plaintiff company, nor to pay the said sum of £30,000, or any part thereof, out of the funds of the Plaintiff company, on account of shares in *Barned's Banking Company*, nor to give such, or any such, letter of guarantee or indemnity as hereinbefore mentioned, to the said *James Freeling Wilkinson*, *Samuel Henry Hinde*, *Francis Martin*, *Robert Hill*, *William Chapman Harnett*, *Henry White*, *Henry Joseph Westrup*, or any or either of them."

Par. 43. "The directors concealed from the Plaintiff company the aforesaid transactions, and no report or account has ever been made or given by the directors to the Plaintiff company touching such transactions, or any or either of them, nor have such transactions, or any of them, been at any time approved, confirmed, or in any way acquiesced in by the Plaintiff company."

Par. 44. "The directors made, or caused to be made, in the account-books of the Plaintiff company, divers entries relating to the payments of the said several sums of £10,000, £5000, and £15,000; but such entries did not shew the actual nature of the transaction, but falsely represented such payments as being 'loans.' Such entries were calculated and intended by the directors to deceive, and effectually to conceal from the auditors of the Plaintiff company, or any person skilled in account keeping, as to the true nature of the aforesaid transactions."

Par. 45. "For instance, in the company's cash-book, the following entry appears to the credit of cash, under date the 26th June, 1865:—'*J. Barned & Co.* (lent) £10,000,' thus representing, contrary to the fact, that the said £10,000 had been lent to the said *J. Barned & Co.*, whereas, in point of fact, that sum was the £10,000 paid by the directors as aforesaid, on account of the said 3000 shares. There is no debit entry of the said £10,000 appearing in the said books, except under date the 4th of July, 1865, but under that date an entry appears in the said cash-book, debiting the said *Barned & Co.* with such sum."

Par. 46. "In the said cash-book the said £5000 paid by the company as aforesaid, is also entered to the credit of cash as '*J. Barned & Co.* (lent) £5000.' Those two sums of £10,000 and £5000 were carried into the loan ledger as loans to the said *J. Barned & Co.*; but subsequently, and under date the 30th of July, 1865, in the general ledger they were transferred to *Barned's Banking Company's* account."

Par. 47. "The said payment of £15,000 made as aforesaid, was entered in the company's cash-book to the credit of cash, and debited to *Barned's Banking Company.*"

Par. 48. "But under date of the 30th of September, 1865, the whole of the said sum of £30,000 was transferred in the company's ledger to an account called 'Investments,' and the sum now stands to the credit of such account."

By an order dated the 17th of March, 1866, the Plaintiff company was ordered to be wound up; and on the 8th of May an order was made for winding up *Barned's Bank.* This bill was filed in July, praying for declarations that the directors of the Plaintiff company had no power or authority to take or accept the 3000 shares, and 500 shares, or any of them, on behalf of the company, or to give the letter of guarantee or indemnity before mentioned, and that such letter ought to be delivered up to be cancelled, and for an order accordingly; also for a declaration that the appropriation of the three sums of £10,000, £5000, and £15,000, was a breach of trust; and for an account and payment.

To this bill the Defendant *Brown* demurred.

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Mr. *G. M. Giffard*, Q.C., and Mr. *Hemming*, in support of the demurrer:—

The question turns upon the construction of the memorandum and articles of association, and upon the resolution of June, 1865.

The business of a bill-broker and scrivener was one of the objects of the society, and the business of a scrivener includes money dealing and investing in all kinds of monetary securities, including shares.

Certain shares, in a limited company, were taken in the names of certain persons, and were guaranteed by the Plaintiff company. This case is not that of trustees of a settlement, who are confined to specified securities, or to ordinary trustee securities. Moreover, everything was left to the discretion of the directors, who were empowered to do all things they might consider conducive to the attainment of the objects specified: *Simpson* v. *Westminster Hotel Company* (1); *Taunton* v. *Royal Insurance Company* (2).

The resolution itself is not impeached by the bill.

Even if the entries in the books were not a correct statement of the transaction, can it be said that the transaction itself was, on that account, impeachable? But the nature of the transaction was sufficiently shewn by the entries, especially when carried to the investment account.

There is no suggestion that the shares were taken with a view to the individual interest of any of the allottees.

The allegations in the bill do not bear out the charge of concealment. The bill puts the case on the same ground as that of a loss by a trustee under ordinary private trusts. But a director, who may be regarded as a commercial trustee, has never been held liable for losses occasioned by errors of judgment. In every case hitherto, where directors have been rendered liable for loss there has been an abuse of power for personal advantage: *In re German Mining Company* (3).

But have the directors exceeded their powers? They resolved to purchase *Wilkinson's* bill-broking business. A "money" dealer means a dealer in securities for money of every description. In the parlance of the *Bank of England* returns, everything they

(1) 8 H. L. C. 712. (2) 2 H. & M. 135. (3) 4 D. M. & G. 19.

hold, except cash, is termed "securities." "Securities" comprise not merely value taken by way of pledge, but every representative of value dealt in, on the money market: Lord *Overstone's* Evidence before Committee of 1857 on Bank Acts (1); *Gilbart* on Banking (2); *M'Leod* on Banking (3). The memorandum authorizes "loans on securities," as on shares, and "investments in securities," so that whatever the company might lend on, they might also buy; and if they could buy, they could, if they thought it conducive to the same object, apply for allotments.

The question thus became a matter of discretion, not of excess in the exercise of powers. *Robinson* v. *Chartered Bank* (4), shews that banks in the ordinary course of business do acquire shares.

Mr. *Daniel*, Q.C., and Mr. *Locock Webb*, for Plaintiff, were not called upon.

SIR W. PAGE WOOD, V.C.:—

I think it is quite clear that this bill must be answered, because, although a very ingenious argument has been urged, and probably more may be said when the answer comes in, as to the force of the term "investing in securities," even assuming (which is as high as it can be put) that that would justify buying shares which were current in the market, and selling them again, the argument would not apply to the state of circumstances described in this bill.

The business is defined to be the business of bill-brokers and scriveners. That is enlarged to "the drawing, accepting, endorsing, discounting, and re-discounting bills of exchange and promissory notes, the making advances, and procuring loans on, and the investing in securities." That is the point most strongly relied on as regards the general power, independently of the sweeping clause at the end. Mr. *Hemming* relied very much on these words: "the making advances on securities, the procuring loans on securities, and the investing in securities." He says, investing *in* securities being made a thing distinct from advances *on* securities, would shew that there was something of a larger meaning than merely the taking of a mortgage, or the taking of a

(1) Page 274.
(2) Pages 69, 170.
(3) 2nd ed. vol. i. p. 29.
(4) Law Rep. 1 Eq. 32.

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security. The "investing in" seems to be the actual purchase, as distinct from "advancing on." But, conceding that these words are large enough to include the power of going into the market, and buying railway shares, for a temporary investment, to be sold again afterwards; is the transaction stated and complained of in this bill a transaction of that nature? It was, in truth, a totally different transaction. The directors of the company come to a resolution "that as the board consider that the formation of a limited joint stock bank, on the basis of the absorption of the old firm of Messrs. *J. Barned & Co.*, of *Liverpool*, will be most conducive to the interests of the company, by increasing its connections, the company or its nominees assist the same by applying for 10,000 shares in the proposed bank on the terms above stated." Those are certain terms by which they were to "apply for 10,000 shares, in consideration of which Messrs. *Barned & Co.* are to undertake to pay to the company as bonus £10,000 in shares, and to give the company the option of taking 2000 of the 10,000 shares to be applied for." Therefore, what the resolution comes to is nothing in the shape of an investment in shares, as a means of investing money, but it is for the purpose of assisting, as they say, the discount business. They say, we intended to make a permanent investment in assisting this bank, and it is to be an investment distinctly not of that temporary character which consists of buying and selling shares in the market, because they reduce the 10,000 to 3000 ultimately, and in their letter they say—[His Honour read the letter of the 24th of July]. That statement is accepted. Supposing, therefore, the agreement to have been legitimate on the part of the company, that these shares were not to be dealt with in a way to "militate against the interests of the bank" (a phrase which must mean to provide against a hasty and rapid disposition of the shares, and to impose a fetter on their conversion), I apprehend a bill might have been filed by Messrs. *Barned & Co.*, to enforce the agreement and restrain the sale of the shares.

But the matter does not rest there, with reference to this being a bill to be answered, because the subsequent statements of the bill aver that all this was done by these directors with a knowledge that it was not within their ordinary powers, and that they concealed from their shareholders the nature of the transaction.

They thought that it was a thing which would advance their interests, but, knowing that it was not an ordinary transaction of the affairs of the company, they tried to treat it as a loan of shares, whereas it was, in fact, a purchase, on the terms that are here mentioned. [His Honour read the charges in the bill as to concealment above stated, and continued:—]

Then they give the entries, "money lent," so much. Mr. *Giffard* says, that was the true state of the case at that time; but I do not think that it appears to be so; because the entry is on June the 26th, "*J. Barned & Co.* (lent) £10,000." Now we have Messrs. *Barned & Co.'s* letter of the 21st of June, before this entry, stating the transaction to be "in consideration (not of your lending us money but), in consideration of your applying, either directly or through your nominees, for 10,000 shares in the proposed *Barned's Banking Company, Limited,* we undertake within three months of this date to pay you £10,000 in cash." That is a positive undertaking to take the 10,000 shares; and that, at the very time, is entered as "money lent." But it was not money lent. So that the whole bill, as it seems to me, amounts to this:—"Assuming that you had power, if you would, to buy shares and sell them again, you had not power to enter into a transaction of this character, namely, that you would start a new concern by setting up a joint stock company with a view of increasing the discounts of the firm by so doing; and still less were you entitled to do that by keeping back from the shareholders the facts, and so preventing their having an option or a judgment in the matter. We say, therefore, that we have a right to have the act sifted to the utmost, and we will sift it to the utmost, first, upon the ground that you had no right to do it; and secondly, that you purposely effected it in this way, in order to keep back the nature of the transaction, and that we might not question it."

As to there being averment enough to shew that it was done *ultrà vires,* I think the 42nd paragraph is quite sufficient for that purpose. Mr. *Hemming* put it in this way: "The whole of the articles are not set out, and therefore, *non constat* but that there may be a power." But the 42nd paragraph avers that the directors had no power or authority to take the shares. That is charged. It may very likely be contradicted or denied, not only by way of

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argument, but by some other clause in the articles which we have not got; but that is the averment, which must be taken to be true for the purposes of this argument.

Then as regards the second branch of the argument, which is this: that assuming this not to be within the clause for making advances and investing in securities, the directors are to do "all such things as they shall consider incidental or conducive to the attainment of the above objects"—it appears to me to be much too wide a construction of that clause to say, that if the transaction in question is not within the scope of the original terms there stated, it can be brought within the scope of doing that which is considered to be incidental to the attainment of the objects, the objects being to use money, by making it available in the shape of a return of interest, or of discount. How do they justify it in this resolution? They say, if we take all these shares in the bank, it will increase our connections. What a prodigious extension I must give to those words in order to bring it within the power of the directors to do anything which they may consider conducive to the interests of the company by increasing its connections, however unconnected with the objects stated! I apprehend those powers must be exercised only for the purpose of doing something *bonâ fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment. This was the only ground on which I proceeded in the case of *Taunton* v. *Royal Insurance Company* (1). There I found that the transaction impeached was in the ordinary course of business, and in the way in which other people conducted their business. In that case, if a large amount of advertisement, or of expenditure of money, had been found necessary, it would have been laid out properly; but to carry the principle on to any remote extension of the objects, on the ground that if shares were bought in this bank there would be some control over the business of the discounting, would be, I apprehend, wholly unwarranted by the plainest rules of construction, which must limit the company's powers to those transactions which are naturally conducive to the objects specified. If the principle were thus extended, it would apply to the buying shares in every sort of undertaking—a brewery,

(1) 2 H. & M. 135.

for instance, or any other business where discounts might be of use. The company might become ship-builders, or might be engaged in any other business; they might buy a share in any general merchant's business, because there would be bills in that business which would want discounting, and so they might get more business.

Perhaps the case of *Simpson* v. *Westminster Hotel Company* (1), which was taken to the House of Lords, may be considered a strong application of the principle as to the extension of a company's powers. But that case proceeded on this ground, that the company did *bonâ fide* intend to use the building as an hotel, but they said: "One of the greatest expenses of our hotel is the furnishing of it. With our capital we have not the means of furnishing the whole building, but we have the means of furnishing it in part, and of thus starting it directly. Our only alternative, consequently, is either to leave the building which we have erected wholly unproductive, or to let it until we have got such a fund as will enable us to complete the furnishing." Therefore it was let, and that the letting was not so very far from the objects of the company was shewn by this, that they inserted a stipulation for furnishing luncheons to the different clerks in the office. Everything tended to shew extreme *bona fides* in making use of that as a clear and definite means of getting at their object, and as the only means they had of making the hotel available, because it came to the alternative of leaving the property wholly unproductive, or of getting £5000 a-year for it, with the additional chance of supplying a certain amount of eating and drinking on the premises.

In this case the proceeding is simply an embarking in a totally different business; it is not the buying shares for the purpose of selling them again, or for investment, or anything of that kind, but it is buying shares for the purpose of enlarging the particular business which the company have to conduct. I think that it is clear that the bill must be answered, and the demurrer must be overruled, with costs.

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

Solicitors for the demurring Defendant: Messrs. *Terrell & Chamberlain.*

(1) 8 H. L. C. 712.

V.-C. W.
1866
Nov. 16.

HURRY *v.* MORGAN.

Will—Construction—"Surviving" read as "other."

Testator gave the clear surplus of the rents of his real and leasehold estates, upon trust, after payment of one-fourth to his wife for life, and providing for the maintenance and education of his children, and for the payment of a debt, to be laid out at interest to accumulate till his eldest daughter should attain twenty-one, and then a third part to be paid to her; the other two-third parts to continue accumulating till his second daughter should attain twenty-one, and then a third to be paid to her; the remaining third to be paid to his youngest daughter on her attaining twenty-one. In case any one or more of his three daughters should die under twenty-one and have no issue, then he directed the share or shares of such one or more so dying to be paid *to his surviving daughters or daughter*. He directed his trustees, when and as each of his daughters should attain twenty-one, or marry, *to convey* to each of them one-third part of all his real and leasehold property for her life, for her sole and separate use, with power for such daughter, by her will, to give her third to all, or one or more of her children, as she should think proper; and in default of gift by such will, each such part to go to her children equally as tenants in common, in fee. In default of issue of any one or more of his daughters, testator directed the share or shares of such one or more dying without issue to be limited so as to go *to her surviving sisters* and to their issue, in like manner as their original third parts were directed to be conveyed to each of them. And in case all his three daughters should die without issue in the life-time of their mother, then testator gave his real and leasehold estates, or the yearly income thereof, to his wife for her life, and afterwards over. He also directed that, in such conveyances to be made to his daughters, all necessary trustees and trusts should be inserted therein, for the purpose of protecting the entail and succession designed by him to be effected upon his three daughters, and the issue of them:—

Held, upon the construction of the whole will, that the testator did not intend to exclude children of a daughter first dying from participation in the share or shares of a daughter or daughters afterwards dying under twenty-one without issue; and that to carry out the intention the word "surviving" must be read "other."

THIS was a special case. *Samuel Smith*, by his will, dated the 13th of March, 1829, gave all his real and leasehold estates to his wife and two trustees, and the survivors and survivor of them, her or his heirs and assigns, upon trust to receive the rents, and thereout to keep buildings in good repair; in the next place, to pay one-fourth of such rents to his wife for her life, and then to apply so much of the rents as would belong to his children, for their

maintenance and education respectively; the remainder to raise a fund to be appropriated to the discharge of a debt. He then directed the clear surplus to be disposed of as follows:—"To be laid out at interest, to accumulate until *Harriet*, the eldest of my daughters, shall attain twenty-one years of age, and then one-third part thereof to be paid to her; the other two-third parts to continue accumulating till *M. Priscilla*, my second daughter, shall attain twenty-one years of age; then one other third part to be transferred to her; and the remaining one-third to be paid to my youngest daughter, *Avarilla*, on her attaining twenty-one years of age; and in case any one or more of my three daughters shall die under the age of twenty-one years, and shall have no issue, then I direct the share or shares of such one or more so dying under twenty-one years of age, and without issue, to be paid *to my surviving daughters or daughter*." Testator directed his trustees, when and as each of his daughters should attain twenty-one or marry, to convey to each of them one-third part of all his real and leasehold property, for her life, for her sole and separate use, and with power for such daughter, by her will, to give her third share of the property to all, or one or more *of her children*, as she should think proper; and in default of gift by such will, each such part to go *to her children* equally, as tenants in common, in fee simple. The will continued: "But in default of *issue* of any one or more of my daughters, then the share or shares of such one or more dying without *issue* to be limited so as to go *to her surviving sisters, and to their issue, in like manner* as their original third parts are directed to be conveyed to each of them. And in case all my three daughters shall die *without issue* in the lifetime of their mother, then I give my real and leasehold estates, or the yearly income thereof, to my wife for her life, and afterwards to and equally amongst all the children of my late sister, *Maria Jewsbury*, and to their heirs and assigns, as tenants in common; and I direct in such conveyances to be made to my daughters, that all necessary trustees and trusts shall be inserted therein, for the purpose of protecting the entail and succession designed by me to be effected upon my three daughters, and *the issue of them*."

Testator died on the 14th of March, 1830. *Harriet*, his daughter, married *Arthur Carey Morgan*, and died in 1851, without

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having exercised her power of appointment, leaving two children, *Rosa* and *Henry*, now of age. The widow died in 1858. *Avarilla* married *Henry Columbus Hurry*, and had three children, all infants. *Maria Priscilla Smith* died in July, 1865, unmarried.

The Plaintiffs, Mr. and Mrs. *Hurry*, and their children, contended that, in the events that had happened, under the words "her surviving sisters and their issue," were comprised only Mrs. *Hurry* and her issue, she being the only "survivor."

The Defendants, *Rosa* and *Henry Morgan*, contended that, by "surviving sisters," was meant "other sisters," a construction which would include them.

Mr. *Boyle*, for the Plaintiffs:—

The earliest case in which the Court refused to read the word "survivors" in any other than its natural sense, is *Ferguson* v. *Dunbar* (1), in 1781, before Lord *Thurlow;* which was followed by Lord *Alvanley*, in *Milsom* v. *Awdry* (2); and by Sir *J. Wigram*, in *Leeming* v. *Sherratt* (3). A similar decision was arrived at in this branch of the Court, in *Re Corbett's Trusts* (4); and by Sir *L. Shadwell* in *Hawkins* v. *Hamerton* (5).

Mr. *Whitehead*, for the Defendants:—

The question is one of intention; and in this instance, the "issue" of children are quite as much within the bounty of the testator as the children themselves. This alone is evidence of an intention that by "surviving," he meant "other."

The important feature, however, in this case is, that there is a gift over of the entirety in case of death of *all* testator's daughters without issue; a circumstance which did not occur in *Milsom* v. *Awdry*, *Leeming* v. *Sherratt*, or *Re Corbett's Trusts*. The case is thus brought within the direct authority of *Doe* v. *Wainewright* (6), which turns exclusively on the fact of there being a gift over of the whole, on the death of *all* the children without issue; a case which was followed in *Wilmot* v. *Wilmot* (7), and in *Cole* v. *Sewell* (8).

(1) 3 Bro. C. C. 469, *n.*
(2) 5 Ves. 465.
(3) 2 Hare, 14.
(4) Joh. 591. 6 Jur. N. S. 339
(5) 16 Sim. 410.
(6) 5 T. R. 427.
(7) 8 Ves. 10.
(8) 2 H. L. C. 186, 228.

More recent authorities to the same effect are *Smith* v. *Osborne* (1); *Holland* v. *Allsop* (2); *Hodge* v. *Foot* (3).

The provisions of this will are entirely executory, and were intended to be carried out by conveyances to be made afterwards. Looking upon the words, "to her surviving sisters and their issue," as instructions to a draughtsman, they would be sufficient to authorize him to give life estates to the daughters, as tenants in common, with cross limitations to their issue.

The Defendants' contention is further aided by the subsequent direction to carry out in the conveyances the "entail and succession," designed by the testator to be effected upon his three daughters, and the issue of them.

Mr. *Boyle*, in reply:—

"Issue," in this will, must mean "children," for the testator, in a certain event, directs a share or shares to go "to the surviving sisters, *and their issue*, in like manner as their original third shares were directed to be conveyed to each of them," *i.e.*, to each of them for life, and afterwards *to her children*.

In *Ferguson* v. *Dunbar*, there was a direction, that upon the death of *all the children*, without leaving children, the gift was to fall into the residue. In this case, the gifts over of the whole is to take place only in one contingency, namely, the death of all the daughters in the lifetime of the widow—an event which has not happened.

Sir W. Page Wood, V.C.:—

I think, on the whole, that this case is much more clear than some of those which have been cited, in which the Court has construed the word "survivors" as meaning "others." Much as we know the present leaning of the Courts is against such a construction, yet the House of Lords has very recently decided that the intent of the whole will must be considered, and that there is not such a magic in the word as that the intention of the testator cannot be carried into full effect from the circumstance of his having inaccurately used "survivors" for "others."

Now, looking at the whole of this will, there are so many cir-

(1) 6 H. L. C. 375. (2) 29 Beav. 498. (3) 34 Beav. 349.

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cumstances occurring here which have been mentioned in the other cases, that it appears to me impossible, without departing from the principle established in that comparatively recent case of *Smith* v. *Osborne* (1), to do otherwise than say that the testator intended "survivors" to mean "others." In *Doe* v. *Wainewright* (2), there being a limitation to three persons *nominatim*, as tenants in common, to each of them respectively for life, with remainders to the children,—then a gift over, in the event of any one dying, to the survivor and her children, and a gift over of the whole in default of any of the first takers having children,—it was considered that that gift over in one mass, in default of the others having children, led necessarily to the conclusion that the testator did not intend to die intestate as to any part. But if one child should die leaving children, and then another child, or, perhaps, both the other children, should die, leaving no children, neither of the shares of the two sisters dying successively after the first was dead and leaving children, could go over; if the word "survivors" were construed strictly and literally, though there were children left, there would be an actual intestacy.

I have looked through this will to see if I could find an intention on the part of the testator that the children of the first taker should really be beneficially interested in the property in the event of the default of children of the other takers; and having found that intention, I think the true mode of giving effect to it is to construe the word "survivors" as "others." I thought I could not arrive at such an intention in *Corbett's Trusts* (3); because it was too near *Milsom* v. *Awdry* (4). But in this case the circumstances are peculiarly strong, because the limitation is by way of executory trust, not at all an unimportant point. The testator is not his own conveyancer, but he directs that his trustees shall take care to have a conveyance made by which freehold and leasehold should be so settled that, subject to a life interest in the portion he had given to his wife, it should be conveyed to each daughter "for life, for her sole use, and with power for each daughter, by her will, to give her third share of the property to all, or one or more of her children, as she should think proper, and in default of gift by such

(1) 6 H. L. C. 375. 3 Jur. N.S. 1181.
(2) 5 T. R. 427.
(3) Joh. 591. 6 Jur. N.S. 339.
(4) 5 Ves. 465.

will, each such third part to go to her children equally as tenants in common *in fee* simple, but in default of *issue*," which I agree with Mr. *Boyle* must mean "children," "of any one or more of his daughters, then the share or shares of such one or more dying without issue to be limited, so as to go to her surviving sisters and to their issue in like manner as their original third parts were directed to be conveyed to each of them." That is the expression which Mr. *Boyle* relies on, and I think correctly, as shewing that by the word "issue" was meant "children." "And in case all his three daughters should die without issue in the lifetime of their mother, then he gave his real and leasehold estates, or the yearly income thereof, to his wife for her life, and afterwards to and equally amongst all the children of his late sister *Maria Jewsbury*, and to their heirs and assigns as tenants in common." Mr. *Boyle* makes a remark which, no doubt, is just, in point in fact, that this is not a general limitation over of the whole *en masse*, but only a limitation over of the whole in one mass in a particular event, an event which, as he says, has not happened. I do not think that is material. The testator has given this limitation over in the event of one of his children dying without issue (which I read children) to be for the benefit of the surviving daughters and their children in like manner as the original shares—with, at all events, a gift over of the whole in one mass if all of them should die without children in the lifetime of the widow. In a given event, therefore, he has an undoubted and clear intention of how the whole should go over, and if they had died, as they might well have done, the first leaving children, and the next one or the next two without leaving children, there would have occurred an intestacy.

But the case really does not rest there, because we find in this will an indication, which I think is of great strength, with reference to the proper construction to be given to the words "surviving children." The testator directs that his trustees in such conveyances to be made to his daughters "shall take care that all necessary trusts shall be inserted therein for the purpose of protecting the entail and succession designed by him to be effected upon his three daughters and the issue of them." There is to be a proper trust inserted for the purpose of protecting what he calls

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the entail; and there is a gift over only in the event of the death of all his daughters without children during the lifetime of his wife. It appears to me next to impossible to consider that the intention of the testator could have been that, in the event of one daughter dying leaving children, and the other two dying without leaving children, that entail and succession which he has talked of as to be effected upon his children should fail to take effect. It seems to me that this case is a very strong one for saying that, on this peculiarly worded will, I must hold the limitation to be, in the event that has happened, of one daughter dying leaving children, and the other daughter dying leaving no children, that that share will go over to each family, one half to the children of the daughter who has died, the other half to the surviving daughter, with remainder to her children. I think it is impossible, considering the general class of the authorities which turn on the effect of the gift over, and the apparent intention of the will, on the whole, to carry the limitation over to the children of children, that I can hold otherwise, in this particular case, than that the word "survivors" is to be read as "others."

The declaration will be that Mrs. *Morgan's* children are entitled to one moiety of the share, and of the income, and Mrs. *Hurry* and her children to the other. The costs will come out of the share left, and the costs of all parties will be between solicitor and client; the trustees to have their costs, charges, and expenses, properly incurred.

Solicitors for both parties: Messrs. *Iliffe, Russell, & Iliffe.*

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In re DONCASTER PERMANENT BUILDING SOCIETY.

Permanent Building Society—Redemption of Mortgages—Winding-up—Liabilities of Advanced and Unadvanced Shareholders.

By the rules of a permanent building society, established in 1850, it was provided that the ultimate value of each share should be £120, and the monthly subscriptions on every share 10*s.*, and that all members should continue to pay for the term of fourteen years, or till such time as all the shares of the same date should have attained the full value of £120. Provisions

were made for making advances to the shareholders at the rates stated in *Jones's* tables. It was then provided that if any shareholder, having executed a mortgage to the society for money advanced, should be desirous to pay off or satisfy the same, he should be at liberty to do so by paying to the directors, at once, a fine of 10s. per share, together with all the subscriptions that would become due on the share or shares so advanced, up to the end of fourteen years from the date or commencement of the same; and in consideration of such prompt payment, discount at £5 per cent., according to *Jones's* tables, should be allowed. By another rule, it was provided that the holders of advanced shares, on which subscriptions had been paid for fourteen years, or when the amount so paid should equal the sums advanced, with the interest and other charges thereon, should be entitled to a full and complete release from the mortgage given for securing the same, according to the provisions of the former rule, "and at once cease to be members."

The mortgages executed by the advanced shareholders under the above rules contained provisoes for redemption on regular payment of all subscriptions, and other payments which should become due to the society by virtue of the rules and regulations, and upon observance and compliance, in other respects, with the rules and regulations; and covenants on the part of the mortgagor to pay all subscriptions, fines, penalties, and other payments, which should from time to time become due and payable to the society in respect of the share, according to the rules and regulations for the time being.

Losses having been incurred through the fraud of a secretary, the society, in March, 1865, was wound up. The advanced shareholders were placed, and (notwithstanding opposition) settled on the list of contributories, and, by a subsequent order, the advanced shareholders were empowered to redeem their shares.

All debts having been paid, and all the advanced shareholders having redeemed their shares, a call was made by the official liquidator upon all the shareholders, advanced and unadvanced, for the purpose of satisfying the claims of the unadvanced shareholders:—

Held, that the advanced shareholders were not liable to contribute to the call: on the ground that, upon redemption of their shares, they had, under the rules, "ceased to be members" of the society.

THIS was a summons on behalf of the advanced shareholders of the *Doncaster Permanent Benefit Building and Investment Society*, that an order made on the 21st of July last, for the payment of a call of £12 per share on all the contributories, might be suspended as to the advanced shareholders; and that the order for the call might be reheard before the Judge.

The society was originally established on the terminating principle, but, on the 3rd of December, 1850, was remodelled, and formed into a permanent society; the object being to promote the building of houses by working men, by two modes of procedure—

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one, the monthly investment of small sums in the hands of the society until a share of £120 was accumulated—the other, the purchase of property by means of loans of money from the society, made by way of advances on shares, and secured by mortgage. The former of these two classes of shareholders were termed investors, or "unadvanced," the latter borrowers, or "advanced" shareholders.

The rules of the society, so far as they were material to the present question, were as follows:—

"Rule XII.—1. That every person taking up shares in this society shall pay the sum of 2*s.* 6*d.* per share, and 1*s.* 3*d.* per half share, as entrance money, and at the same rate for every fractional part of a share, and that each member shall be a holder of at least one half share.

"2. That the ultimate value of each share shall be £120, and of each half share £60, and the monthly subscriptions on every share shall be 10*s.*, and on every half share 5*s.*, and in like proportion for every fractional part of a share.

"3. That all shares shall commence and be dated from and on the pay nights in June or December, when shares may be taken up and members admitted on the terms stated above; this may also be done any pay night, on paying all subscriptions with interest thereon, according to *Jones's* tables, back to the month of June or December then last passed, as the case may be.

"4. That all members shall continue to pay their monthly subscriptions, together with all fines and other charges due, on the first Tuesday of each succeeding month, or at such other times as the directors may appoint, for and during the term of fourteen years, or till such time as all the shares of the same date shall have attained the full value named in section 2 of this rule, and no longer.

"7. At every half-yearly meeting all members shall pay in advance, along with their monthly subscriptions, the sum of 1*s.* for every share they hold, and at the same rate for half-shares and fractional parts of a share, and such half-yearly subscriptions, with the entrance fees and fines of every description, shall form a separate account, to be called the contingent fund. From this fund

all expenses, salaries, &c., shall be paid, and at the end of each year, should a surplus remain, it shall be added to the general funds of the society.

"9. Discount at the rate of five per cent. per annum shall be allowed on all payments made in advance, of three months and upwards, according to *Jones's* tables.

"Rule XIII.—1. That all shareholders requiring an advance of money from this society, shall apply to the secretary for the printed form provided for that purpose, which, being properly filled up, dated, and signed by the applicant, shall be returned to the secretary, who shall place it on the list of applications, according to the date of its receipt, and at the next meeting of the committee, shall enter such notice of claim on the minutes of the same.

"3. That all advances to shareholders of this society shall be at the rates stated in *Jones's* tables.

"4. Should a shareholder have given notice for a greater number of shares to be advanced to him than he has previously subscribed for, he shall, within seven days after receiving notice from the secretary of the amount being receivable, pay to the secretary the entrance and subscriptions upon as many additional shares as he may require, and he shall then receive such amount thereon as is set forth in *Jones's* tables.

"Rule XIV.—1. Whenever the funds of this society are not claimed by the shareholders for advances, according to rule 13, and there shall be to the credit of the society, at their bankers, a sum equal to two months' subscriptions beyond the liabilities of this society, the directors shall appoint a ballot to take place among all the shares then unadvanced, and the person or persons whom the ballot shall determine as the person or persons liable to take the share or shares so to be balloted for, shall take the same according to rule 13; but in no case shall any person be compelled to take at one ballot, when shares are balloted for, more than one-fifth of a share; and whenever any shareholder shall neglect or refuse to give security by mortgage for such one-fifth part of a share which he or she shall be liable to take, in pursuance of the ballot, he or she shall withdraw such one-fifth part of a share, pur-

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suant to rule 18. Any shareholder having taken one-fifth part of a share, in pursuance of the ballot, or having withdrawn the same, shall not be again liable to the ballot for or in respect of such share, until every share liable as aforesaid shall have been balloted for.

"Rule XV.—1. When any shareholder shall be entitled to receive his or her share or shares, he or she shall give notice of the nature and situation of the premises intended to be offered for the security thereof to the secretary, who shall forthwith transmit the same to the survey committee, so that they may examine the premises and make a report thereon.

"2. When the directors shall be satisfied that the premises so to be offered as aforesaid, are a sufficient security to the society, they shall direct the treasurer to pay to such shareholder the sum or sums of money which he or she shall be entitled to receive, on such shareholder executing such mortgage of such premises as the solicitor of this society shall require, and depositing the same, and all other necessary title deeds relating thereto, with the trustees, as a security to the society, for so much money as shall be therein expressed to be secured.

"Rule XVII. 1. Any shareholder who shall be desirous of withdrawing from this society any share or shares on which no advance has been made, may do so on giving one month's notice in writing to the directors at any monthly meeting of the society, and such shareholder shall receive back the subscriptions then paid, with interest thereon, at the rate of 5 per cent. per annum, as shewn by *Jones's* tables, but all fines incurred previously to such application shall be deducted therefrom.

"2. If more than one shareholder shall give notice to withdraw at one time, they shall be paid in rotation, according to priority of notice; but widows and children of deceased shareholders shall always have priority.

"Rule XVIII. 1. If any shareholder, having received an advance on any share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to

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the society, and thenceforth to become answerable to the society for the payment of the subscriptions and other charges, as the same shall become payable; and the trustees shall, at the request and cost of such shareholder, release him or her from all future liability in respect of such share or shares, if they see no objection.

"3. If any shareholder, having executed a mortgage to this society for money advanced, be desirous to pay off or satisfy the same, he or she shall be at liberty to do so, by paying to the directors at once a fine of ten shillings per share, together with all the subscriptions that would become due on the share or shares so advanced, up to the end of fourteen years from the date or commencement of the same, and in consideration of such prompt payment, discount at the rate of 5 per cent. per annum, according to *Jones's* tables, shall be allowed, and on the receipt of such future subscriptions, together with all fines and other charges due on the share or shares so paid up, the directors shall order the trustees, at the cost of the owner, to indorse a receipt or acknowledgment on the mortgage, according to 6 & 7 Will. 4, c. 32, s. 5, and therewith to deliver up to the said member all deeds and other documents in their custody relating to the property so released or discharged.

"Rule XXVIII. 1. That the funds of this society shall belong to the members in proportion to the time they have been subscribers, and at the end of fourteen years from the date of each share, &c., or when the accumulated subscriptions, with the interest thereon, shall attain the value provided by these rules, the holders of each advanced share, or part thereof, shall receive, in full satisfaction of all claims on this society in respect of the same, the sum of £120 per share, £60 per half share, &c., and thereupon cease to be members.

"2. That in like manner the holders of advanced shares, on which subscriptions have been paid for fourteen years, or when the amount so paid shall equal the sums advanced with the interest and other charges thereon, shall be entitled to a full and complete release from the mortgage given for securing the same according to the provisions of rule 18, sect. 3, and at once cease to be mem-

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bers. But any shareholder whose term of membership has expired, shall, on paying the entrance fee, &c., be admitted as a new member."

The mortgage deeds each contained a proviso for redemption in the following terms:—"Provided always, and it is hereby declared and agreed, that if the said" (mortgagor), "his heirs, executors, administrators, and assigns, shall, from time to time, for the full end and term of fourteen years, to be computed from the" (date of the share), "well and regularly pay all subscriptions and other payments which shall become due and payable from him and them to the said society, by virtue of the rules and regulations for the time being thereof, and shall, in all other respects, observe and comply with the rules and regulations of the said society, according to the true intent and necessary import of such rules and regulations, then these presents, and the appointment, grant, and release hereby made, shall cease and be void."

In case the mortgagor, his heirs, &c., should at any time thereafter "fail, neglect, or refuse, for three monthly meetings, to pay, observe, and perform, all or any of the subscriptions, payments, and regulations, which are, or ought to be, paid, observed, and performed, by him and them, to or towards the said society, in respect of his and their said share," the mortgage was to become absolute; and the deed contained a covenant by the mortgagor with the trustees of the society, that he, the mortgagor, his heirs, &c., some or one of them, "shall and will pay, or cause to be paid to" (the trustees) "all subscriptions, fines, penalties, and other payments, which shall from time to time become due and payable from him to the said society, in respect of his said share, according to the rules and regulations for the time being of the said society, without any deduction or abatement thereout, on any account whatsoever."

In 1862, the funds of the society were found to have suffered from the frauds of a secretary. At that time they had overdrawn their account at their bankers to the extent of £1800, and the title deeds of the advanced shareholders had been deposited with the bankers to secure the amount. Upon the above frauds becoming known, so many of the investors gave notice of withdrawal

under rule 17, sects. 1 and 2, and became creditor shareholders, that the society was unable to meet its engagements to them; and when some few borrowers wished to redeem under rule 18, sect. 3, difficulties arose by reason of the mortgages and title-deeds being deposited with the society's bankers. Under these circumstances, a winding-up became necessary, and an order to that effect was made on the 11th of March, 1863.

The list of contributories having been settled, including all the advanced shareholders, one of the latter raised the question of his liability to be placed on the list, before His Honour in Chambers, who decided that the fact of his being an advanced shareholder did not exempt him from being made a contributory.

On the 11th of February, 1865, an order was made authorizing the official liquidator to receive from the advanced shareholders who had executed mortgages to the trustees, and who might be desirous of redeeming their respective mortgages "according to the rules of the society and the terms of their respective mortgage deeds," a fine of 10s. per share, together with "all the subscriptions that should become due on such share or shares up to the end of fourteen years from the date or commencement of the same," less discount at the rate of £5 per cent., to be ascertained by calculations based on *Jones's* tables, together with all fines and other charges due to the society. It was further ordered, that on receipt of the respective amounts, the liquidator and all other proper and necessary parties should execute reconveyances, and give up the mortgage deeds; and it was stated that the order was made "without prejudice to the liability of any mortgagor or mortgagors, or shareholders, entitled to such equity of redemption as aforesaid, so redeeming, to his, her, or their liability, as a contributory to the society in respect of the share or shares held by such mortgagor or mortgagors respectively."

Under this order, all the advanced shareholders had redeemed their mortgages, on the terms mentioned in the order; in the course of the winding-up, the debts due to third parties, including the society's bankers, had all been paid, and the sums owing to creditor shareholders who, before the winding-up Petition was presented, had given notice to withdraw, had all been satisfied; but there remained a large sum made up of amounts due, according

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to the society's rules, to persons who were investing shareholders at the date of the winding-up order, together with subsequent interest; and this call had been accordingly made.

Mr. *Amphlett*, Q.C., and Mr. *C. T. Simpson*, in support of the summons:—

The advanced shareholders have redeemed their mortgages, and in so doing have paid all that by the rules of the society they are required to pay; and hence are not liable to contribute to the adjustment of the claims of the members *inter se*.

They were placed on the list of contributories because they were held liable to the claims of creditors; but all the creditors are now paid, and no one remains to be paid but the unadvanced shareholders. The result is, that no call whatever is necessary, since the persons who would have to pay would be the same as those to receive the money.

The rules, it is true, contain no express provision for the *extinguishment* of the share on redemption, as in *Priestley* v. *Hopwood* (1); but it follows, from the construction of the rules, that a resolution of the directors, accepting a proposal for redemption, must have the effect of extinguishment.

That the advanced shareholders in this society are not liable to an ordinary call is plain from this, that each advanced shareholder would have to pay an equal sum, irrespective of the value of his share, which depends upon the length of time that he has been a member. This is the first case of a *permanent* society, the peculiarity of which is, that the members do not all begin their periods of subscription together: *Scratchley* on Benefit and Building Societies (2); so that some shares are much more valuable at any given time than others. But the effect of enforcing a call upon all the members alike would be, that a member of only a week's standing, whose share is worth only £60, would have to pay the same as a member of fourteen years' standing, whose share is worth £120. A contribution by call is, therefore, wholly inapplicable to the case of a permanent society. Profits (if any) would not be distributable in equal shares, then why should losses?

Advanced shareholders are in substance not shareholders, though

(1) 12 W. R. 1031. (2) Ed. of 1851, pp. 54, 55.

so called, but mortgagors. Why should mortgagors suffer for losses occasioned by the frauds of their mortgagees' secretary?

The whole question is concluded by rule 28, sect. 2, which provides that the mortgagor, upon having paid for fourteen years, or when the amount paid by him shall equal the sums advanced and charges thereon, shall "cease to be a member." In the case of redemption of a mortgage by a shareholder in a *permanent* society, it must necessarily be so—for if not, for how long a period of time is he to continue paying? The case is different from those which have been decided of terminating societies, on this ground: the mortgagor has, by a special contract, anticipated all future payments due from him for a fixed number of years, taking the risk of winning or losing, and how can he be called upon to pay anything beyond the terms of his contract? He can get no advantage whatever from profits, why should he contribute to losses?

Mr. *Daniel*, Q.C., and Mr. *Wickens*, for the Respondents, the unadvanced shareholders:—

The object of the call is, to distribute the society's liabilities upon all the members equally.

Rule 18, sect. 3, which alone (as we say) applies to redemptions, does not say that a redeeming mortgagor is to "cease to be a member." It only says that the property he has mortgaged shall be released. There is nothing to shew that redemption of a mortgaged share leads to extinguishment of that share.

An advanced shareholder, who has paid for fourteen years, or for the greater or less period that may be necessary under rule 12, sect. 4, "ceases to be a member," no doubt, under rule 28, sect. 2. But that rule applies only to a solvent state of things, and to what will take place during the continuance of the society. It does not contemplate the case of a winding-up. Here the career of the society has been suddenly cut short, and the call must be thrown equally upon all the members, not only for the payment of debts to strangers, but also for the discharge of liabilities *inter se*, as it would be in bankruptcy. For the purposes of winding-up, the share of each member is considered equal to £120. Rule 12, sect. 4, which provides for losses, by requiring a longer period of subscription, furnishes a key to the solution of the question.

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The mortgage deed was prepared to carry out a particular term. There was never an intention to substitute the deed for the tables. Rule 12, sect. 4, shews that the mortgage was to be, not for the good of the individual, but of the society. The mortgagor must pay to the end of the term fixed by that rule. The security does not vary the original contract.

It is only confusing the question, to introduce into it any question of profit. Profit can only arise by one of two ways, forfeitures or fines, and those are provided for.

The question has been already decided on the former application, and is, moreover, covered by authority: *Farmer* v. *Smith* (1); *Sparrow* v. *Farmer* (2); *Handley* v. *Farmer* (3). In the first of these cases, *Martin*, B., compares the rights of members in a society of this kind to a partnership, in which all the members are bound to contribute to a common loss.

Mr. *Amphlett*, in reply.

SIR W. PAGE WOOD, V.C.:—

The meaning of these rules may not have been very clearly expressed, but I think, on the whole, the better construction is that which has been contended for by Mr. *Amphlett*.

The intention that all the shareholders should be put upon an equal footing, is not disputed on behalf of the advanced shareholders; the only question is, as to how it is proposed to proceed, so as to put all the shareholders on an equal footing.

Now, it is evident that some estimate must be made of the period through which it is probable subscriptions will have to be paid; but when a power of redemption is given, that power can only be exercised without reference to the future gain or loss which the society may make, or sustain. There must always be a balance of probability of gain or loss at the date when the redemption takes place; but the redeeming mortgagor gains nothing beyond the ordinary interest which is payable under the society's rules.

Accordingly two modes of effecting redemption are possible. One is that which was adopted by the societies to which the cases

(1) 4 H. & N. 196. (2) 26 Beav. 511. (3) 29 Beav. 362.

which have been cited refer. The mortgage is made for an advance calculated upon the *datum* of a number of years, and when redemption is effected, the only result is, that the mortgagor repays the advance, and the society relies for further subscriptions no longer upon its mortgage security, but upon the remedies which it possesses under its rules against ordinary subscribing members. The other method is this:—The same period of years is fixed, within which redemption must take place, or not at all; and then, if the advanced shareholder redeems, he must pay an amount which is fixed, without regard to what may be the success or failure of the society. When he is advanced he is still a shareholder, but when he redeems he pays a stated sum, which may be more or less than the amount which he would have had to pay, had he continued a shareholder to the end of the term during which he would have been compelled to pay. He runs the risk of money becoming more abundant on the one hand, or of its rising to 8 per cent. on the other; and, anyhow, he cannot redeem without prepaying his subscriptions for the whole residue of a *fixed term* of fourteen years.

Now it occurred to me at first that the 3rd section of rule 18, which speaks of redemption, but does not speak of a shareholder ceasing to be a member of the society upon redemption, was in favour of the view of the Respondents, and that there ought to be a continuing payment throughout the fourteen years, or whatever period might be necessary. But the 28th rule renders it impossible to hold that construction. The 2nd clause of that rule provides, that "the holders of advanced shares on which subscriptions have been paid for fourteen years, or when the amount so paid shall equal the sums advanced, with the interest and other charges thereon, shall be entitled to a full and complete release for the mortgage given for securing the same, according to the provisions of rule 18, sect. 3, *and at once cease to be members*." The alternative is, not that if and when, in consequence of the general favourable result of investments, the whole of the money together shall amount to £120 a share, then you shall be released; but the alternative is,—you must pay the sums advanced, and the interest and other charges thereon, and then you shall be released.

Now there is nothing in the mortgage deed contrary to that.

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Rule 28, sect. 2, says, a member who has been advanced shall be let off when he has paid subscriptions for fourteen years, or for some greater or less period, and *at once cease to be a member*. The rule cannot mean this; that, after paying subscriptions for fourteen years, or to an amount equal to the sums advanced and interest, he is to cease to be a member; but that, if he chooses to pay fourteen years' subscription (together with 10*s*. fine for the privilege of doing so at once) his share is then to be released, but he is not to cease to be a member till he has gone on paying for fourteen years. There is nothing in the 3rd clause of rule 18 to say that, in the latter case, he is to be retained as a contributing member. He may by that clause anticipate payment, but, if he does so, common sense shews that he must be in the same position as if he had made continuous payments for fourteen years. If that be the construction, I do not see why he should not do exactly the same thing upon a mortgage. The rules say:—You must pay for fourteen years, or you may discount that if you like, but only upon the terms prescribed by rule 18, clause 3.

A call having been now made upon all the members of the society alike, the Appellants seek to escape. There is no doubt that they were members for the purpose of paying debts, and therefore it was proper and right they should be made contributories; and it was upon that ground that they were settled upon the list. But when that has been done, and the question is solely between the members of the society standing upon the same rights and liabilities, *inter se*, as if there had been no winding-up at all, and when the advanced shareholders have actually advanced their subscriptions to the end of fourteen years, and thus discharged their liabilities, I feel no difficulty as to the question of fairness as between all the advanced shareholders and the rest, and I must expunge the call so far as it relates to the advanced members. The unadvanced shareholders must pay the costs of this application.

Solicitors for the Appellants: Messrs. *Brooksbank & Galland*, agents for Mr. *E. Woodhead, Doncaster.*

Solicitors for the Respondents: Messrs. *Van Sandau, Sons, & Cumming*, agents for Mr. *Fisher, Doncaster.*

POPE *v.* GREAT EASTERN RAILWAY COMPANY.

V.-C. W.
1866
Nov. 15, 16.

Vendor and Purchaser—Payment of Purchase-money into Court—Deterioration of Property.

A railway company having contracted with the ground landlord for the purchase of freehold house property, entered into possession and turned out the weekly tenants, to whom the property was sub-let by lessees under the ground landlord. After the weekly tenants had been turned out, the property was greatly damaged by strangers, who entered forcibly and pulled some of the houses to pieces :—

Held, that the damage, to the deterioration of the property, having been occasioned by the act of the railway company, in entering upon the houses and turning the tenants out of possession, they must pay the purchase-money into Court without being allowed the option of giving up possession.

THIS was a motion on behalf of the vendors, that the purchasers, the *Great Eastern Railway Company*, might be ordered to pay the purchase-money into Court.

The Plaintiffs were the ground landlords of certain freehold houses in *Bethnal Green*, which were held by lessees under them. By these lessees the houses were sub-let to weekly tenants. By an agreement, dated the 13th of November, 1865, the railway company agreed to purchase this property, for £2,500, from the Plaintiffs, under the provisions of the *Great Eastern Railway (Metropolitan Stations and Railways) Act*, 1864, and to give £800 for severance. After the execution of the agreement, but without paying the deposit-money, the company entered into possession of the property contracted to be sold, and turned the weekly tenants out of possession. On these tenants being turned out, some strangers made a forcible entry into the houses, pulled some of them to pieces, and carried away much of the materials. Men were put in by the company, for protection of the remaining property, which was hoarded up. The lessees under the Plaintiffs declined to pay any ground rent in respect of the houses that had been destroyed, and the Plaintiffs were liable to them under covenants for quiet enjoyment. Under these circumstances the present bill was filed against the railway company, praying specific

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performance of the contract, payment of consequential damage and of the purchase-money into Court.

Mr. *G. M. Giffard*, Q.C., and Mr. *Bedwell*, for the Plaintiffs, cited *Dart's* Vendors and Purchasers (1), and *Pell* v. *Northampton and Banbury Railway Company* (2).

Mr. *Willcock*, Q.C., and Mr. *W. W. Streeten*, for the Defendants, the Company, insisted they had not taken possession under the Plaintiffs, who were mere reversioners: *Flower* v. *The London Brighton, and South Coast Railway Company* (3).

SIR W. PAGE WOOD, V.C.:—

The Defendants, in taking possession of the property, have taken possession of the whole estate, including the interest of the Plaintiffs, and the case falls within the authority of the cases collected in *Dart's* Vendors and Purchasers (4), and especially *Dixon* v. *Astley* (5), which have decided that where possession is taken by the purchaser consistently with the contract, but he has exercised improper acts of ownership, by which the value of the property is deteriorated, and the estate is rendered a less sufficient security for the money, he will be ordered to pay his purchase-money into Court. I hold that the deteriorated state of the property in this case by which permanent injury has been inflicted, and the reversion seriously prejudiced, is due to the acts of the Defendants in entering upon the property and turning the weekly tenants out of possession, and, as that is the case, the purchaser is not entitled to the option given in *Clarke* v. *Wilson* (6), of paying his purchase-money into Court, or delivering up possession. The order will be for payment into Court, within a month from service of the order, of the principal, without prejudice to the question of interest.

Solicitors: Mr. *E. Pope*; Messrs. *Baxter, Rose, Norton, & Co.*

(1) p. 704 3rd ed.
(2) Law Rep. 2 Ch. 100.
(3) 2 Dr. & Sm. 330.
(4) p. 704 3rd ed.
(5) 1 Mer. 133; 19 Ves. 564.
(6) 15 Ves. 317.

In re ST. PANCRAS BURIAL-GROUND.

V.-C. W.

1866

Mar. 10. 12; Nov. 17.

Burial-ground—Appropriation of Burial Fees to charitable Purposes—Closing of Burial-ground—Purchase by Railway Company—Claims by Church Trustees, Vicar, Incumbent, and Vestry—Lands Clauses Act, ss. 69, 79—Jurisdiction—Scheme refused.

By a local Act of 1792, land was directed to be purchased for an additional burial-ground of a parish, and it was provided that the land, when purchased, was to vest in the vicar and churchwardens of the parish and their successors, for the purpose of a burying-ground for the use of the parish for ever. The fees were to be received by the churchwardens, and accounted for to the trustees. In 1816, a body was constituted called the church trustees, consisting of the vicar, churchwardens, and other parishioners; and by a statute in 1821, the Act of 1792 was repealed, except that the additional burying-ground purchased under that Act was to remain vested in the vicar and churchwardens and their successors, for ever, for the use of the parish. The church trustees were to fix the amount of the burial fees, which were to be received by the churchwardens, and when they amounted to £200, were to be paid over to the church trustees, who were to apply them to certain defined charitable purposes. Afterwards, by an Order in Council, the additional burial-ground was closed for the purposes of burial; but the church trustees continued to receive burial fees for interments in a new cemetery which had been provided. A railway company having taken part of the additional burial-ground, the church trustees petitioned the Court, under the Railway Acts, that the purchase-moneys might be invested to their account and the dividends paid to them:—

Held, that the Court had no jurisdiction under the Railway Acts to make the order as prayed:

Upon a second Petition being presented by the Attorney-General for a scheme:—

Held, upon the two Petitions, that the Court had jurisdiction; that the Petitioners' rights were not extinguished, but only suspended, and that they were entitled to the order as prayed.

A PETITION in the above matter, and in the matter of the *Midland Railway Acts*, and the *Lands Clauses Act*, was presented by Messrs. *Edwin Ward Scadding & Walter Scadding*, clerks to the church trustees of *St. Pancras, Middlesex*, praying that a sum of £2350, standing in Court to the credit of *Ex parte the Midland Railway Company, Ex parte the Burial-ground of St. Pancras, the Church Trustees, Vicar, and Churchwardens, and Vestry of the Parish of St. Pancras, the Incumbent of the new Parish of Old St.*

2 C P. 611.

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Pancras, and other the Parties interested in the Burial-ground of St. Pancras, might be invested in stock, in trust in the above matters, to "The Account of the Church Trustees of *St. Pancras* as Trustees of the Additional Burial-ground of *St. Pancras*;" and the dividends paid to the Petitioners.

The £2350 was the aggregate of several sums paid by the company into Court for property taken by them for the purposes of their undertaking; namely, for a piece of land, part of the additional burial-ground of *St. Pancras* parish, taken under the *Midland Railway Act* of 1863, £600; for a small house and piece of the same ground, taken under the same Act, £600 and £150 respectively; and for a right of tunnelling under the ground, under the *Midland Railway Act* of 1864, £1000. These amounts had been fixed by three separate valuations under the *Lands Clauses Act*.

The several claimants to the dividends of this sum of money, when invested, were:—1. The church trustees of *St. Pancras;* 2. The vicar of *St. Pancras;* 3. The vestry and churchwardens; and 4. The incumbent of the parish chapel.

By an Act of 1792, for providing an additional burial-ground for *St. Pancras*, it was provided that the lands which should be purchased for the purposes of the Act, should be vested in the vicar and churchwardens, and their successors, for the purpose of a burying-ground for the use of the parish for ever; and by a statute of 1 & 2 Geo. 4, c. xxiv., passed in 1821, the Act of 1792 was repealed, but it was declared that the freehold in the burying-ground so purchased should remain vested in the vicar and churchwardens, and their successors for ever, for the use of the parish.

The church trustees claimed the fund on the following grounds. They were appointed by an Act of 1816 (56 Geo. 3, c. xxxix), "for building a new Parish Church, and a Parochial Chapel in the Parish of *St. Pancras*;" and their duties were further regulated by the Act of 1821 (1 & 2 Geo. 4, c. xxiv.), before mentioned, for (amongst other things) altering and enlarging the powers of the Act of 1816. The same body were, by virtue of the Act of 1821, constituted trustees of the additional burial-ground, which adjoined the original churchyard of the parish. This, together with the original churchyard, was, by an Order in Council, issued in or about the year 1855, closed, and had ever since been disused for the pur-

poses of burial. A small building, intended as a dwelling for the sexton, stood upon the ground, and a few sheep had been occasionally pastured there.

A new cemetery at *Finchley* had been provided for *St. Pancras* parish, under the provisions of the Burial Acts, and since its formation the trustees had continued to receive their fees for burials at *Finchley*, and had applied them to the same purposes as those to which the former burial fees were applied, which, by the Act of 1821, were defined to be: 1. Payment of the salaries or wages of sextons and other persons employed about the burial-ground; 2. Defraying the expense of keeping the burial-ground in order; and 3. The same purposes as those of the pew rents; and these were: 1. Payment of the salaries of ministers and lecturers, clerks, organists, and pew-openers, and other persons employed in the parish chapel; 2. Payment, in case of deficiency of the rates, of the interest of sums borrowed under the Acts of 1816 and 1821; 3. Liquidation of the principal of such sums, and repair of the chapel; and 4. Aid of the poor rate.

As well before as since the discontinuance of burials in the additional burial-ground, the church trustees had retained the ground under their control, had been in possession of it, and had let the sheep pasturage and received rent for the same. They had also, since Lady Day, 1863, let the small building to the railway company at a rent of £30 a year.

The vicar of *St. Pancras* claimed the interest of the fund, on the ground that the trustees of the burial-ground were trustees of it only as a burial-ground, which trust had ceased, and that the vicar was entitled as owner of all consecrated land within the parish.

The vestry and churchwardens, on behalf of the parish, contended, in like manner, that the trusts of the church trustees had ceased, but relied on the proviso of the Act of 1821, that the ground was to remain vested in the vicar and churchwardens "for the use of the parish."

The incumbent of the parish chapel claimed under *Lord Blandford's Act*, 19 & 20 Vict. c. 104 (1).

(1) The following sections of Acts of Parliament were referred to and commented on:—

By the 32nd Geo. 3, c. lxvi. (1792), being "An Act for providing an Additional Burying-Ground for the use

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Mr. *Osborne*, Q.C., and Mr. *Vaughan Hawkins*, for the Petitioners.

[They referred to *Fitzgerald* v. *Champneys* (1).]

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of the Parish of *St. Pancras*," it was enacted (sect. 1) that the vicar and churchwardens of the parish for the time being, and their successors, together with twenty-six other parishioners named, and their successors (to be elected in manner thereinafter mentioned), should be appointed trustees for putting the Act into execution, with powers of electing new trustees when the number should be reduced to ten. By the 5th section, power was given to the trustees to purchase land, and it was provided that, upon payment of the purchase-money, all and every person and persons claiming any estate or interest in the land should thereupon "be divested of all such estate, right, title, and interest therein, and the same shall from thenceforth become, and is hereby absolutely vested in the vicar and churchwardens of the said parish and their successors, for the purpose of a burying-ground for the use of the said parish for ever." The 10th section directed the trustees to cause the said additional or new burying-ground to be inclosed with a wall as therein mentioned; also to cause a small dwelling to be erected for the residence of such person or persons as the trustees might think proper to appoint for the care and protection of the ground; and to make and build such vaults, or other conveniences for the interment of the dead, as they should think necessary and proper, and that when such additional burying-ground should have been fenced in and consecrated, the same should be made use of for the interment of the dead, subject to such orders and regulations as should from time to time be made by the trustees, so that such orders and regulations might not interfere with or lessen the settled fees then payable to the vicar. Section 11 empowered the trustees to defray the expenses of carrying the Act into execution, and to borrow any sum or sums of money necessary for the purposes of the Act; "which money so to be borrowed, and the interest thereof, are hereby charged upon, and shall be payable from time to time out of, the fees which shall be received by the churchwardens of the said parish on account of burials (but subject, nevertheless, to such payments and outgoings as the same have heretofore been subject to), and likewise chargeable upon and payable out of the rates from time to time to be made for the relief of the poor of the said parish." Section 14 enacted that the churchwardens of the parish for the time being, should, until the whole of the principal money to be borrowed as aforesaid and interest should be discharged, yearly render to the trustees an account of the several sums which they should have received for burials, and the sums paid thereout, and also of other moneys therein specified; and that they should pay to the trustees the balance, or so much as should be necessary for the purposes of the Act: also, that the overseers of the poor of the parish should, from time to time, pay to the trustees or their treasurer annually, out of the poor's rates, such a sum, not exceeding 1*d.* in the £1, of the annual rent or value of the rateable hereditaments

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(1) 2 J. & H. 31: 7 Jur. N.S. 1006.

Mr. *E. Charles*, for the vicar:—

The statute only contemplates profits arising from burials. Those profits only are given to the church trustees. Profits of any other

within the parish as the trustees should think necessary for the purposes of the Act. It was also enacted (sect. 17) that the surplus rents of the church lands, after payment of such debts as the same might be subject to, and the repairs of the then church and chapel, should be applied in aid of the burial-fees and rates appropriated for the purposes of the Act; and the trustees of the church lands were yearly to account to the churchwardens for such surplus, which, together with the burial-fees payable to them as aforesaid, should be paid by the churchwardens at the times and in the manner before directed to the trustees of the Act, until the whole of the principal money to be borrowed, and interest, should be discharged, and afterwards to such parochial purposes as the vestry of the parish should from time to time order and direct.

The additional burial-ground having been purchased, the above-mentioned Act of the 56 Geo. 3, c. xxxix., was passed in 1816, whereby the vicar and churchwardens of the parish of *St. Pancras* for the time being, and fifty other persons therein named, and their successors, were appointed trustees for putting that Act into execution, and were to be called "church trustees." By the 21st section they were empowered to purchase land for the erection of a new church and chapel, and (sect. 33) to enter into contracts for the building of the same. By the 36th section it was enacted that all lands and hereditaments, moneys, securities for money, chattels, and effects, which, before the passing of that Act, the vicar and churchwardens and other inhabitants of the parish, or any other person or persons whomsoever, were entitled to or possessed of in trust for the parishioners, and the rents and profits whereof, were to be applied from time to time for and towards the repairs of the parish church of *St. Pancras*, and of the chapel-of-ease at *Kentish Town* to the same belonging, or either of them, and in aid of the burial-fees and rates appropriated by the Act of 1792, from time to time, as occasion should require, "shall, subject and without prejudice to the provisions and enactments of the said last-mentioned Act as to the said burial fees and rates, from and immediately after the passing of this Act, be vested in, possessed by, paid, delivered, and belong unto, and the same is and are hereby absolutely vested in the said trustees," &c. The trustees were required (sect. 38) to build a church and also a chapel; the new church was (sect. 42) to be called the "parish church of *St. Pancras*;" the then vicar of *St. Pancras*, or the vicar for the time being, to be the minister of the new church; and the then parish church (sect. 44) to be called the "parish chapel of *St. Pancras*;" but by the same section it was provided that "nothing in this Act contained shall affect, encumber, change, alter, or extend, any right or rights of any person or persons whomsoever, in, to, or in respect of the said present church, or the chancel, vaults, or pews of or within the same, or any part thereof." The new chapel was (sect. 45) to be called *Camden Chapel*; pew rents in the new church, and also in the chapels, were (sect. 54) to be paid, applied, and disposed of for the purposes of that present Act, and the trustees were authorized (sect. 58) to fix the rates and fees for

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kind arising from the ground are undisposed of, and belong to the vicar as owner of the profits of all the consecrated ground in the parish (1). The Court will not direct a charity to apply the pro-

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burials in the vaults of the new church and of the chapel, and to alter and amend the same; but the rates or fees to be paid to the vicar of the parish for the time being were not (sect. 59) to be reduced below the sums then payable for, or in respect of, the then present church. Powers were given to the trustees of borrowing money for the purposes of the Act, and for that purpose to make assessments and rates on the occupiers of lands and hereditaments in the parish.

In 1821 was passed the Act of the 1 & 2 Geo. 4, c. xxiv., whereby, after reciting the two before-mentioned Acts, and that the building of the church on the east side of *Euston Square* was in progress; and that it was expedient that powers should be given to the trustees to make additional rates, and to take up at interest a further sum of money; that the Church Building Commissioners were determined to build two new chapels in the parish; and that it would be very inconvenient to make a specific rate or rates for the payment of the moneys agreed on for the purchase of the sites of the two new chapels, "or for any other purpose for which rate or rates might be required, according to the directions" of the Church Building Acts of the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134; and that it would be more convenient if the trustees of the 56th Geo. 3, c. xxxix., were authorized to raise and pay "all such moneys" out of the funds to be raised for the purposes of that Act; and that it would tend to the more uniform management and regulation of the ecclesiastical affairs of the parish, if all the parochial chapels then existing, or thereafter to be built, in the parish, were made subject to the same powers of the trustees, and the same directions and regulations as by the Act of 1816, and that Act, were or were intended to be given to the new parish church, and the parochial chapel to be called *Camden Chapel;* and that it would be more convenient if all the powers by the two above-mentioned Church Building Acts given to, and all the acts, matters, and things, so required to be done by the vestry or select vestry, or the persons exercising the powers of vestry, so far as concerned the parish of *St. Pancras*, were given to and provided to be done by the trustees of the Act of 1816; and if the powers by the said Acts given to the churchwardens of any parish of making rates for the purposes therein mentioned, and of borrowing money, and of fixing and altering the rents of pews, and of receiving and recovering such rents or otherwise in relation to rates, pew rents, or moneys to be raised were, so far as concerned the parish of *St. Pancras*, also vested in the trustees of the Act of 1816: it was enacted that the 32 Geo. 3, c. lxvi. should be, and the same was thereby repealed, "save and except, that the burying-ground provided by the trustees under the said Act, shall be and remain vested in the vicar and churchwardens of the said parish, and their successors for ever, for the use of the said parish." By the 2nd section, all books, papers, and documents, possessed by the trustees of the

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(1) Com. Dig. "Cemetery," A. (2).

ceeds of consecrated ground to inconsistent objects, as, for example, in aid of the poor rate.

The vestry can claim only as *cestui que trust* of the charity

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repealed Act, or the churchwardens of the parish, or any other officer or officers, person or persons whomsoever, under the authority or for the purposes of the repealed Act, and all sums of money which should be remaining in the hands of any such person or persons as last mentioned, should be respectively paid and delivered up to the trustees of that present Act; and it was provided that the trustees of that present Act should pay and discharge all sums of money which should appear to be fairly due and owing from the trustees of the repealed Act, and should indemnify the last-mentioned trustees. By the 3rd section, the trustees appointed by the Act of 1816 and their successors, were appointed trustees for carrying that present Act into execution; and ten additional trustees were (sect. 4) to be appointed by the vestry, and four (sect. 7) by the trustees. By sect. 9, the trustees were empowered to raise money, in addition to the moneys authorized to be raised under the Act of 1816, as they should judge necessary for the purposes of that present Act, or of the Act of 1816, upon the credit of the rates, or of the pew rents, or "of any other funds, estates, and premises, applicable to the purposes of the said recited Act, or this Act, in such manner and form" as in the Act of 1816 were mentioned and contained, "with reference to the money to be borrowed under the provisions thereof," or as near thereto as circumstances would admit. All the several parochial chapels within the parish, and the chapels about to be built by the commissioners, and all future parochial chapels within the parish were (sect. 28) to be subject to the same powers and provisions as were contained in the Act of 1816 with respect to *Camden Chapel*, but it was provided that "nothing in this Act contained shall in anywise defeat, abridge, or alter, the powers and authorities of the vicar of the said parish or his successors, under the said recited" Church Building Acts, "or otherwise." The powers and duties by the said two Church Building Acts respectively vested in the vestry and in the churchwardens of the parish, by sect. 29 were, as far as the parish was concerned, vested in the trustees of that present Act. By the 44th section, the trustees were authorized to fix the rates and fees to be paid for interment in the burying-grounds of the parish, and from time to time to make such alterations therein as they might think proper, and also to direct such payments as might be necessary or proper to be made out of the moneys to be received on account of such fees and rates; "and all such rates and fees shall be paid to the churchwardens of the said parish for the time being, who shall .... render to the trustees an account of all the said sum or sums of money as they shall from time to time receive; and they are hereby required to pay unto the said trustees or their treasurer, from time to time, the moneys so received by them, whenever the same shall amount to or exceed the sum of £200, and the balance thereof at the time of rendering such account." Powers were also given by sects. 45, 46, 47, of compelling accounts to be rendered, and payment of balances to be made. Then, by sect. 48, directions were given as to the appropriation of funds, authorized by the 56 Geo. 3, to

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trustees, whose trust only extended to burial fees, which have ceased. The burying-ground was never attached to the parish chapel, consequently the incumbent can have no claim.

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be raised; and the application of pew-rents and burial fees was directed by sects. 51, 52, and 53. Sect. 51 enacted that the pew rents of the new parish church, and of all the parochial chapels then being or thereafter to be within the parish, and which were, by the Act of 1816, placed under the management of the said trustees (except the chapels to be erected by the commissioners), should, after deducting costs and expenses, be applied "as follows (that is to say), the salaries, stipends, or allowances of the ministers who shall do any duty in the said chapels respectively, and of any lecturer or lecturers who may be appointed by the vicar for the time being to preach lectures in the said parish church, and of the clerks, organists, and pew-openers, and other persons who shall be employed in the said church and chapels respectively, shall be thereout first paid and discharged; provided always, that such salaries, stipends, or allowances, shall be respectively paid by or out of the pew rents of the church or chapels in respect of which the same shall arise and be payable, if such pew rents shall be sufficient for that purpose; but if the same shall not be sufficient, then the deficiency shall be made good out of any surplus of the general pew rent fund; and the interest of any sum or sums of money which hath or have been, or may be borrowed .... under the authority of this Act, or the said recited Act, shall be thereout paid in the next place." By sect. 52, it was provided that, where sums of money borrowed had been or might be granted on the credit of, or chargeable as well as for rates as for pew rents, the rates should be the primary fund, and the pew rents should be applicable only in case of deficiency of the rates; and the residue of the pew rents (except as aforesaid), after answering the purposes aforesaid, should be applied "in liquidation and discharge of the principal sums borrowed .... and also in and for the repairing and keeping in repair of the said parish church, and all the parochial chapels which now are, or hereafter shall be within the said parish, and under the management of the said trustees (except as aforesaid); and after answering all the purposes aforesaid, ... the surplus of the said pew rents (except as aforesaid, if any there shall be) shall from time to time be applied in aid of the poor's rates of the said parish." Sect. 53 enacted, "that the rates and fees for burials in the burial grounds or places of the said parish (except such rates and fees as shall arise in respect of burials in any catacombs or vaults which may be built or made under the said chapels to be erected by the aforesaid commissioners, and subject to any express charges which may be made on such rates or fees respectively under the authority of this Act) shall be applied, first in payment of the salaries, wages, or allowances, of the sextons and other persons who shall be employed in or about the said burial-grounds and places .... secondly, in payment of the expenses of keeping the burial-grounds and places in good order and condition, and properly drained, and the fences thereof in good and substantial repair; and, thirdly, the surplus of the said burial rates and fees, after answering the purposes aforesaid,

Mr. *Fooks*, and Mr. *Fooks*, jun., for the incumbent of the parish chapel:—

The theory of the ownership of the church trustees is upset by the Church Building Acts, and by the 10th section of *Lord Blandford's Act*, which have the effect of repealing the local statutes. The "parish chapel" district is a "new parish" within the meaning of the last mentioned Act, and the whole churchyard, old and additional, has now become one, and belongs to the incumbent.

The VICE-CHANCELLOR:—I cannot see that this burying-ground comes within the description of "lands, tithes, tenements, and hereditaments, and other endowments, belonging to such church, or held by, or vested in, any person or body corporate in trust exclusively for the incumbent," within the meaning of the 10th section of *Lord Blandford's Act*.

Mr. *G. M. Giffard*, Q.C., and Mr. *Pemberton*, for the churchwardens, representing the vestry:—

The receipt of fees by the church trustees does not touch

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shall go and be applied in the same manner, and for the same purposes, as hereinbefore are directed concerning the application of the pew rents, or such of them as shall from time to time be remaining unperformed, and capable of taking effect."

Reference was also made to the *Lands Clauses Act*, sects. 69, 70, 76, 79; the *Public Burial Act* of 1852, 15 & 16 Vict. c. 85, sects. 22, 32, and 36; and *Lord Blandford's Act*, 1856, 19 & 20 Vict. c. 104, sects. 10, 11, 12.

By the 84th section of the former of the two Midland Railway Acts (26 & 27 Vict. c. lxxiv., and 27 & 28 Vict. c. ccxxxi., both of which incorporated the *Lands Clauses Act*), it was recited that under the provisions of the 32 Geo. 3, c. lxvi., an additional burial-ground for the parish of *St. Pancras* had been provided, and that the fee simple in the additional burial-ground and a house in connexion therewith, erected for the residence of the person having charge of the ground, was vested in the vicar and churchwardens for the time being of the parish, and that the said burial-ground and house were under the control of the trustees acting under the 56 Geo. 3, c. xxxix., and the 1 & 2 Geo. 4, c. xxiv.

By the latter of the two Railway Acts, sect. 25, it was enacted that "the compensation to be paid by the company in respect of the burial-ground of *St. Pancras*, shall be paid by them into the Court of Chancery to an account, *Ex parte the Burial-ground of St. Pancras*, in the same manner, and subject to the same provisions as are prescribed by the *Lands Clauses Consolidation Act*, 1845, in cases where owners of lands fail to make out a title to lands to the satisfaction of the promoters of undertakings" (*i.e.* under sect. 76).

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the question. They never had a right to the possession of this land.

By the Act of 1792, the fee was vested in the vicar and churchwardens, and their successors; and by the Act of 1821, it was expressly directed that the fee should remain in the vicar and churchwardens, "for the use of the parish." The church trustees were mere managers; and when the ground was shut up, their powers not only ceased over the additional burying-ground, but never properly extended over the new ground at *Finchley*. The burial board of the parish, consisting of ratepayers appointed by the vestry, are by the Act of 1852 (1) (sect. 34), directed to fix the payments for burials; and (sect. 36) to pay them to the parties entitled to receive the same, being, as we say, the churchwardens, on behalf of the parish.

The proper destination of this fund is, under the 69th section of the *Lands Clauses Act*, to liquidate a debt on the new burying-ground at *Finchley*, as being an incumbrance affecting lands settled to the same uses as those to which the lands taken are subject.

Mr. *Sargant*, for the railway company.

Mr. *Hawkins*, in reply:—

The Petitioners are entitled to the dividends under the 79th section of the *Lands Clauses Act*, as being the persons in the actual receipt of the rents and profits, consisting of the pasturage and the rent of the house.

March 12. Sir W. Page Wood, V.C.:—

Some difficulties present themselves upon this Petition; and, even if no steps be taken by those who assert a contrary right, I am not clear that the income of this fund ought to be applied in the manner sought by the Petition.

It does not appear to me that the 79th section of the *Lands Clauses Act* has any application to this particular case; because that section directs that the person in possession must be deemed to be the owner until the contrary is shewn. I have acted upon

(1) 15 & 16 Vict. c. 85.

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that on two or three occasions very strictly, and I think it ought to be so acted upon, for this reason; that a person who, for public purposes, is obliged by Act of Parliament to dispose of, to a railway company, some little corner of his estate, which may be a very large and valuable one, is not to have his whole estate and title brought into jeopardy. The Legislature has anxiously provided that the Court shall not, upon these occasions of applications for payment of purchase-money, deal with the property in any way whatever which can affect the title, unless it be shewn so clearly as to be beyond question, that there must be litigation upon the question of title. I acted upon that principle against the Crown in the case of *Re Alston's Estate* (1), which I think was not appealed from. In that case a gentleman possessing several miles of foreshore had a small piece taken for the purpose of making a jetty. Then the Crown sold its rights to the whole of the foreshore, and the company attempted, under the title derived from the Crown, to deprive the gentleman of his right to the property. I had no hesitation in saying, in that case, that I would not have the title tried here, and, accordingly, I gave him the purchase-money.

This particular case stands in a very singular position. I am not quite clear that Mr. *Hawkins'* argument may not be sound with reference to the rents and profits in this sense:—Here is a piece of land vested in the vicar and churchwardens, as a corporation, for ever, upon the driest possible trust; that is to say, the vicar and churchwardens take nothing. The trust is directed to be for the use of the parish, originally as a burial ground; and I apprehend that that clause of the Act of 1821 which says that the former Act of 1792 shall be repealed, except that the burying-ground shall remain vested in the vicar and churchwardens, for the use of the parish, means for the use of the parish *quâ* burial ground; especially when we remember that it was consecrated ground. Being vested in the vicar and churchwardens *quâ* burial ground, this body of gentlemen, called the church trustees, are to have the control and fixing of the rates of payment to be made in respect of interments, and the fees, when received by the churchwardens, are to be received by them merely as bailiffs or receivers; because as soon as the fees amount to £200, they are to be paid

(1) 5 W. R. 189.

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over to the church trustees; the churchwardens, therefore, as such, had not the slightest interest in these rents and profits; they were merely the hands to receive them; they could not expend one farthing of them. The Petitioners, therefore, received all rents and profits that could be made from this land as it then existed as a burial-ground.

Now, if there was any produce to be made by the pasturing of sheep there, or any benefit to be derived from the letting of the house which was built for the sexton to live in, I apprehend there was nothing whatever in the Act of Parliament that gave to the trustees either the one or the other—nothing even authorizing them to fix the rent of the house, or the amount of agistment payable in respect of the sheep. In point of fact, if there were any other rents and profits, the circumstance would be rather against the title of the trustees, because the other rents and profits would not go to them, and consequently they would not take all the profits. That is rather a difficulty in the case than otherwise, because I cannot regard the fact that the trustees have received, perhaps, a few pounds from some butcher in respect of the pasturage, or even rent from the railway company, as sufficient to bring them within the 79th section of the *Lands Clauses Act*. At all events, upon the Act of Parliament, until the contrary is shewn, I take it that they had no right to the rent of the house, or to the profit derived from the pasturage of the land.

Then the case stands thus; the burial-ground being closed, these gentlemen were arrested altogether from deriving profit from the only source from which they had lawfully derived it—namely, burials; and in compensation and in lieu of that, they were to take, at *Finchley*, under the general Act, certain fees, payable to them in like manner, with respect to the burials at *Finchley*. Then the *General Burial Act* provides, with reference to these grounds, that they shall be preserved sacred, walled, drained, and kept in proper and decent repair; and there they are to remain. What, then, would have been the position of the trustees at that time? There is, I think, the difficulty of their case. It appears to me that as long as the burials remained prohibited, they could take no interest whatever derivable from the land. The fee simple being in the vicar and churchwardens, the church trustees could take no

more than the Act gave them. In respect of the burial fees they got compensation by means of the fees from *Finchley;* but they could get nothing from this particular piece of land; and so it might have remained for ever if the Railway Act had not interposed.

Then comes the Railway Act, which makes this land profitable. The Legislature has thought fit to enable the railway company to take this land, they making due provision for the decent re-interment of whatever remains may be disturbed. But the Legislature has said nothing about the amount to be paid in reference to this bit of ground; and the 69th section of the *Lands Clauses Act*, as it seems to me, if no right be established to the contrary, is the clause upon which I must proceed with reference to this application. That section of the Act which relates to the re-investment of land, provides that such moneys shall remain so deposited until the same be applied to some one or more of the following purposes, that is to say, in the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes (this provision is not applicable to the incumbrance on *Finchley*); but, secondly, the money was to be applied "in the purchase of other lands, to be settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which the money was paid." Therefore, whenever any application is made, the proceeds of this land ought to be laid out upon exactly the same trusts as those which affect the other land; and as the other land was out of *London*, all the rights of the trustees to receive the burial fees were revived, the only thing which interposed being the Order in Council for shutting up the burial-ground in *London*. Then we come to the next clause, the 70th, which says that "such money may be so applied as aforesaid, upon an order of the Court of Chancery . . . made on the Petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied, it may, upon the like order, be invested in bank annuities, or in government or real securities, and the interest, dividends, and annual proceeds thereof, paid to the party who would for the time being

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have been entitled to the rents and profits of the lands." As at present advised, if no better right is established, I think I might be justified in making an order to let the church trustees receive these dividends, as being persons entitled to the rents and profits of the lands in respect of which the money has been deposited, had there been any receivable, and who would be entitled to the rents of land to be bought hereafter.

I quite see that many things might be said with reference to the application of this money, arising on the ground of compensation having been originally made at *Finchley;* and on the ground that compensation has been already made to a certain extent with reference to the interments: and, again, there might arise a question as to whether, if the ground had remained in the state in which it was before the Railway Act passed, an application might not have been made for the appropriation or dealing with the property on some principle of *cy-près*, which the mere passing of the Railway Act ought not to alter or impair.

But I think the proper order to make at the present time is simply an order to invest the fund and accumulate it, and to let the rest of the Petition stand over until Easter Term; then I shall see if anything is done by the Charity Commissioners, or others, to raise the question. I do not think the fund ought to be parted with; at least, until those who claim on the ground of the trustees being, as Mr. *Giffard* says they are, defunct, have had an opportunity of putting forward their case. This they cannot do on this Petition; it is impossible to have such a question raised upon a Petition praying for the distribution of railway money.

I shall therefore make an order to let the money accumulate, and allow the matter to stand over until the last Petition-day in Easter Term, so as to give ample time for the consideration of the question. The order will be without prejudice to any of the rights of any of the parties to the Petition.

A second Petition was then presented by the Attorney-General in the same matters, and in the matter of the Act of 52 Geo. 3, c. 101, and the *Charitable Trusts Act*, 1853, praying that a scheme might be settled for the due application and administration of the

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sum of £2350, and of the interest arising from the investment of the same.

Th two Petitions now (Nov. 17) came on together.

Mr. *Wickens* for the Attorney-General :—

The second Petition has been presented solely to give the Court jurisdiction.

The Secretary of State has power to permit burials in closed burial grounds, but this permission will probably never be sought in the present instance.

Mr. *Osborne*, Q.C., and Mr. *V. Hawkins*, for the first Petitioners :—

The trusts upon which the Petitioners hold the land are not absolutely extinguished; they are only suspended; the *Finchley* ground may have to be closed; new land may have to be purchased, and then the powers of the trustees will revive.

Where lands are devoted to a charitable purpose, and that purpose is accomplished, and yields an income which is devoted to a second charitable purpose, the appropriation of land taken under the *Lands Clauses Act* must follow the second purpose. Suppose land devoted to the building of the court of a college, and the students' fees appropriated to the foundation of a professorship, would not the income of part of such land, taken by a railway, follow the second purpose? Could the Attorney-General come in with a scheme?

The effect of the *Lands Clauses Act* is, that this income is simply burial fees, and none other. It is not a question of legal title, but of beneficial interest. The money cannot be diverted from us to any other purpose.

Then has there been any disturbance or interruption, or is there any defect of title in us to prevent our receiving all the fees from all the burial grounds in the parish? Whether under an information, or under the *Lands Clauses Act*, we are entitled. The *General Burial Act* continued our rights.

Mr. *Charles* for the vicar :—

The power of the Secretary of State does not touch the case of income other than burial fees, as to which other income there never

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was any cessation of right, because it never was in the church trustees at all.

Mr. *G. M. Giffard*, and Mr. *Pemberton*, for the churchwardens.

Mr. *Fooks*, and Mr. *Fooks*, jun., for the incumbent of the parish chapel.

Mr. *Sargant*, for the company.

Nov. 17. Sir W. Page Wood, V.C.:—

It strikes me, I confess, now that I have the opportunity of deciding, as far as the Attorney-General is concerned, whether or not these trustees are entitled to have any part of this fund, which I directed to be accumulated, paid over to them or not, that the right is in these trustees to have the dividends paid out to them, and that it is not a proper course to have any scheme directed, as proposed by the Attorney-General.

Of course I could not determine any question of right when the matter was before me on the former occasion. It appeared to me, *primâ facie*, that the trustees had made out a right to have the dividends paid over to them; but nobody could appear, upon a mere application under the Railway Act, to propose a scheme—nobody could appear even for the vicar hostilely—and, therefore, it was necessary to have some course taken by which all those who chose to assert a right might have an opportunity of doing so. The Attorney-General has thought it right to have the question brought before the attention of the Court; and I certainly am glad to have an opportunity of having it discussed.

As regards the right, it stands thus:—The Attorney-General, by Mr. *Wickens*, puts the case in this form, which was glanced at, I remember, on the former occasion. Here is a piece of land, vested in the vicar and churchwardens under the original Act of the 32 Geo. 3. It was vested in them and their successors as trustees, for the purposes of a burying-ground for the use of the parish. That is the first trust. We next have to inquire who were the persons to receive the only emoluments, namely, the burial fees, and we find that, by a subsequent Act of the 1 & 2 Geo. 4, c. 24,

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the burial fees of this ground are to be fixed by the trustees, the present Petitioners, and that, being so fixed, they are to be received by the churchwardens, but when they amount to a given sum they are to be paid over to the trustees. So that if it had not been for the interposition of the Privy Council in directing, under the *General Burial Act*, this ground to be closed, the state of things would have been clearly this: A piece of land, held by the vicar and churchwardens as dry trustees for the parish, for the purpose of its being used as a burying-ground—the profits of that burying-ground, realised in pursuance of the trust for which it was held, namely, profits in the shape of burying fees, being payable to the trustees.

I apprehend there could be no doubt, under these circumstances (except for the interposition of the Order of the Privy Council), that if this ground had been taken by a railway company, the proper course would have been to invest the moneys received from the railway company, under the 69th section, in another piece of land, wherever it might be thought proper, which piece of ground would be held for the same uses and trusts, and would, therefore, be held perpetually as a burying-ground for the use of the parish, and the burial fees would be perpetually received by the present trustees. Then, if that were so, if the burying-ground had not been closed when the property was taken by the railway company, I should have ordered the money to be invested in consols, and the income to be paid to the same persons who were receiving the income of the profits arising out of the trust, who would be these trustees; and the trustees would have received that money, and have applied it according to certain other trusts fastened upon the money.

But I need not pursue that, because the question before me now is, whether these trustees are entitled to receive such fees; if so, they will of course have to apply them according to the trusts under which they received them. Now what ought to be the effect of the order which closed the burying-ground? Mr. *Wickens* puts it thus, and it is the sole ground upon which a scheme can be rested. He says the whole thing is in air; the trust came to an end the moment the ground was closed as a burial-ground; no fees could be received, nothing could be done, and the whole matter is

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at an end. That cannot be quite so, because, although there came the Order in Council closing the burial-ground and preventing it being used for the only purposes for which the trust was created, the fee simple remained, of course, vested in the vicar and his successors; and for what purposes? Upon trust that it should be a burying-ground; that trust being in no way displaced by being prevented for a certain time in its operation. I say "for a certain time" because although probably it will be closed for ever, yet in fact under the *Burial Act* (and this is not a mere technical point, for reasons which I shall presently assign) all that was done was this, that Her Majesty, by and with the advice of her Privy Council, has exercised the power contained in the 2nd section of the 15 & 16 Vict. c. 85, which gives a power, after a time mentioned in the order, to direct that burials "shall be discontinued wholly, or subject to any exceptions or qualifications mentioned in such order, and so from time to time, as circumstances may require, provided that notice of such representation, and of the time when it shall please Her Majesty to order the same to be taken into consideration" shall be given. Then there is the 6th clause, providing that notwithstanding any such order, where certain persons have a right of interment in any vault of any church, chapel, churchyard, or burial-ground, affected by the order, it shall be lawful for one of Her Majesty's Secretaries of State, on application made, and on being satisfied that the exercise of the right will not be injurious to health, "to grant license for the exercise of such right during such time and subject to such conditions and restrictions as such Secretary of State may think fit." The Act, therefore, does not say that this shall never be used as a burial-ground, but it gives to this body, the Privy Council, a right to say that during the time to be specified in their order (and if no time is mentioned, of course it will be until further order), there shall be no burials. But they are entitled, from time to time, to make orders with reference to interments; and the Secretary of State may from time to time authorize interments in vaults, &c. under certain restrictions, and of course with respect to those interments, the fees would be received, and the whole of the trusts would be exercised. That being so, an Act of Parliament comes into force (whilst this ground is in a state of complete suspension *quâ* burying-ground), by which

a railway company takes the land, and takes it subject to all the trusts that affect it. Those trusts affect the land, notwithstanding the order of the Privy Council. The *Land Clauses Act* saying the money shall be laid out in the purchase of other land to be affected by the same trusts, the trustees are enabled to buy other land, in another place, at *Finchley* or elsewhere (not within what is called the "Metropolis," to which alone the Order in Council applies); and with regard to this new land (and this is why I say it is not quite a technical point) the disqualification of the trustees arising from the Order in Council at once drops off, and the new land becomes subject to the same trusts; and then the fees will be received and handed over to the same persons who received them before. It comes to this—that the Order of the Privy Council operates just as a flood might have done. It would have been difficult to drain off the water for some time—for a greater or less number of years—and, of course, during that time, none of the purposes could be carried into effect. Then, suppose a railway company had bought the land in that state, and there had not been any burials for some years, on account of the water not being yet drained off, still the trusts would attach themselves to the land; the land could not be used for any other purpose without some other Act of Parliament, or some other proceeding being taken; and, accordingly, when the disqualification is removed, the land remains as before, subject to the same trusts. It is as if, by an Act of Parliament, this piece of land had been transferred, with all these trusts affecting it, to *Finchley*, where the Order in Council would have no more effect upon it, because the whole scope and object of these Burial Acts does not extend beyond the sphere of the metropolitan districts, and, accordingly, the whole of the trusts revive in their full force. That appears to me to be the proper construction of the combined effect of the two Acts of Parliament which constitute this trust on the one hand, and of the *Railway Clauses Act* on the other. Therefore, the right course now is, to make simply an order as prayed; and that these accumulations and the future dividends be paid to the trustees. Beyond that I have no direction to give at all; because of course the trustees will hold them, as they hold any other moneys, subject to their trusts. I think, for this purpose, I ought to dismiss the

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Petition for the scheme; but there can be no costs, for I am of opinion that this is a proper question to have been raised. I therefore dismiss the application for a scheme, and I direct the dividends to be paid to the trustees.

Mr. *Osborne* asked for the Petitioners' costs of the Petition out of the trust fund.

The Vice-Chancellor ultimately gave no costs out of the fund, except such of the Petitioners' costs as had been occasioned by adverse litigation.

Mr. *Pemberton* asked what His Honour proposed to do with the costs of the Respondents on the Attorney-General's Petition.

The Vice-Chancellor said he could not give costs out of the fund to those Respondents, who had, in fact, supported the Attorney-General. He could not give costs against the Attorney-General, nor against the trustees. The only costs upon this Petition that could come out of the fund would be those of the Petitioners, as Respondents. The railway company would pay all the costs of the other Petition so far as they had not been occasioned by the litigation.

Solicitors for the first Petitioners, and for the Vicar: Messrs. *Scadding & Son.*

Solicitors for the Attorney-General: Messrs. *Fearon & Clabon.*

Solicitors for the Incumbent of the Parish Chapel: Messrs. *Bird & Moore.*

Solicitor for the Vicar and Churchwardens: Mr. *W. D. Cooper.*

Solicitors for the Company: Messrs. *Beale, Marigold, & Beale.*

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1866
Nov. 6.

Benefit Building Society—Mortgage—Stamp Duty—10 *Geo.* 4, *c.* 56—6 *&* 7 *Will.* 4, *c.* 32.

Mortgages to benefit building societies, by persons who are not members, are exempted from stamp duty by 6 & 7 Will. 4, c. 32, according to which Act all the exemptions in favour of friendly societies, contained in 10 Geo. 4, c. 56, are extended to benefit building societies.

5 Ex 79
6 Ex 198.

SPECIAL CASE.

By deed, dated the 4th of December, 1863, the Plaintiff mortgaged certain hereditaments at *Croydon* to the trustees of the *National Permanent Mutual Benefit Building Society* (a benefit building society within the provisions of 6 & 7 Will. 4, c. 32, the rules of which had been duly certified by the registrar of friendly societies), for securing repayment of a sum of £140, which had been advanced to the Plaintiff (who was not a member) out of the balance of the fund not employed in advancing the shares of the members; and by rule 7 authorized "to be laid out in such investments, or advanced upon such legal or equitable securities as the law permits," in the names of the trustees. The mortgage deed was not stamped. The Plaintiff had recently contracted to sell the property comprised in the mortgage to the Defendant, who had accepted the title subject to an objection that the mortgage deed ought to have been stamped with the *ad valorem* duty.

The question whether the deed was liable to stamp duty was brought before the Court by special case.

Mr. *E. L. Pemberton*, for the Plaintiff, contended that all mortgages to benefit building societies established under 6 & 7 Will. 4, c. 32, were exempt from stamp duty under the provisions of sect. 37 of 10 Geo. 4, c. 56, which were incorporated into that statute: *Walker* v. *Giles* (1); *Barnard* v. *Pilsworth* (2).

Mr. *Horace Davey*, for the Defendant, contended that mortgages to benefit building societies were not exempted from stamp duty

(1) 6 C. B. 662.

(2) Cited in 6 C. B. 698, *n.*

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by 6 & 7 Will. 4, c. 32, in which statute the exemption contained in sect. 37 of 10 Geo. 4, c. 56 was not incorporated. By sect. 4 the provisions of the former Act relating to friendly societies were to be extended and applied to benefit building societies, "so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof;" while sect. 8 expressly enacted, "that no rules of any such society, or any copy thereof, nor any transfer of any share or shares in any such society, shall be subject, or liable to, or charged with, any stamp duty whatsoever." In *Walker* v. *Giles* the mortgagors were members of the society, and therefore that case did not decide anything more than that mortgages to the society by persons who were members were exempt from stamp duty. It was, therefore, open to him to contend that the exemption from stamp duty contained in 10 Geo. 4, c. 56, s. 37, did not apply to mortgages to the society by a stranger: the provisions of that section being controlled by the preamble (sect. 2) that it was "expedient to give protection to such societies, and the funds thereby established, and to afford encouragement to other persons to form the like societies." Now although it might be greatly for the benefit of these societies that their members should be able to obtain money on mortgage from the society without paying stamp duty, no benefit would accrue to the society, nor would any protection or encouragement be afforded to the funds, by exempting securities, given to the trustees by mere strangers, from stamp duty.

SIR W. PAGE WOOD, V.C.:—

I think I am bound by *Walker* v. *Giles* (1), to decide in favour of the Plaintiff, even assuming that that case only applies to mortgages by persons who are members of the society. That decision, which was solemnly affirmed in *Barnard* v. *Pilsworth* (2), compels me to apply all the benefits that are conferred by the former Act, 10 Geo. 4, c. 56, upon friendly societies, to benefit building societies established under 6 & 7 Will. 4, c. 32. The argument that the words of sect. 4 did not embrace the general exemption

(1) 6 C. B. 662. (2) 6 C. B. 698, *n.*

from stamp duty given by the former Act, and that, having regard to sect. 8 (which would have been useless if the exemption in sect. 4 was general), sect. 4 only applied to things *ejusdem generis*, is no doubt of great force; but it was expressly overruled in *Walker* v. *Giles* (1), where the Court, taking a liberal view, held that the provisions of these Acts were not to be restricted, but construed so as to afford an encouragement and protection to societies to be established thereunder, and to the property obtained therewith. Looking at the deliberate decision made in that case, so long ago as 1848, and the great number of transactions that have ever since been carried on in these societies on the faith of it, I do not think that I ought now to disturb it. I then come to the present case, where the mortgage is by a person not a member of the society. The words of sect. 37 of 10 Geo. 4, c. 56, exempting from stamp duty all bonds or other securities to be given to or on account of any such society (while sect. 13 expressly authorizes the trustees to invest the surplus funds on real securities, or otherwise), are perfectly general, and I should be unduly narrowing the construction of that Act, if I were to hold that mortgages by persons not members were not within the exemption thereby afforded. I cannot accede to Mr. *Davey's* argument, that the exemption from stamp duty of this sort of security does not benefit the society lending the money. Surely it is a great advantage to the society, when they have money to lend, if they can go into the market and say to persons in want of money:—"Borrow of us and you will have no stamp duty to pay." Mortgages by persons not members are therefore exempt from stamp duty under 10 Geo. 4, c. 56. Then, according to *Walker* v. *Giles*, every provision of that Act is incorporated in the subsequent Act, 6 & 7 Will. 4, c. 32, and I must therefore hold, that the mortgage deed in question does not require a stamp.

Solicitors for the Plaintiff: Messrs. *Russell & Davies.*
Solicitors for the Defendant: Messrs. *Thompson & Debenham.*

(1) 6 C. B. 662.

V.-C. W.
1866
Nov. 17, 19.

THROCKMORTON *v.* CROWLEY.

Set-off—Costs of Suit—Judgment Debt—Damages—Costs of Summons.

Plaintiff, a landlord, was liable to the Defendant, his tenant, for the costs of an injunction suit for alleged breach of covenant, which suit had been dismissed. He had subsequently recovered judgment against the Defendant in an action for rent. He then became liable to the Defendant for damages which had been assessed in Chambers, in respect of the wrongful injunction. He was further entitled to his costs of a summons to vary the certificate for damages taken out by the Defendant, which had failed:—

Held, that he was entitled to set off his judgment debt against the damages, but not against the costs of the suit; and that he was also at liberty to set off his costs of the Defendant's summons to vary against the costs of the suit.

THIS was a summons on behalf of the Plaintiff, adjourned from Chambers, raising the question whether the Plaintiff was not entitled to set off the costs of the suit which, by an order dismissing the bill, he had been decreed to pay to the Defendant, also the amount of any compensation which might be awarded to the Defendant under an order of reference to the Chief Clerk, and any other costs which might be ordered to be paid by the Plaintiff to the Defendant, against a judgment debt which had been recovered by the Plaintiff against the Defendant.

The Defendant *Crowley* was a yearly tenant of a farm belonging to the Plaintiff, Sir *Nicholas W. J. Throckmorton*, under an agreement dated the 5th of February, 1862, one of the clauses of which was as follows:—"Tenant to bring, and spread upon the farm, two tons of good rotten dung, or some other purchased manure of equal value, for every ton of hay, clover, or straw, he shall sell, or cause to be sold, or conveyed away from the premises, and shall produce vouchers to the landlord, or his agent, that the same has been bought; and also produce vouchers of the quantity of hay, clover, or straw sold. So, in like manner, for every acre of turnips, or other green crop sold, or carried off, tenant shall cause to be consumed, by his stock upon the said farm, one ton of oil-cake, or artificial food, of equal value thereto (or its equivalent for any smaller or lesser portion than an acre shall contain), and produce vouchers thereof as aforesaid at the next succeeding several rent days."

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A half-year's notice to quit was, on the 25th of March, 1865, served on the Defendant, who, in anticipation of the expiry of his term, removed off the premises a quantity of clover and hay. The bill was filed on the 25th of July to restrain such removal, and on the same day an *interim* injunction was obtained, on an undertaking for damages, until after the 5th of August. On the 4th of August, His Honour, upon the construction of the above clause, refused to continue the injunction, and no order was made, except that the costs be costs in the cause. On the 10th of November, 1865, an order was made dismissing the bill; and the Defendant's costs of suit were taxed at £45 10*s.* 6*d.* An order was also made on the 21st of December to refer the Defendant's claims for compensation for damages by reason of the injunction, under which order the Chief Clerk found a sum of £60 12*s.* 6*d.* due to the Defendant, which finding the Plaintiff and Defendant had, by cross summonses (heard immediately before the present), sought to vary. The Vice-Chancellor reduced the amount of compensation due to the Defendant to £20; gave no costs as to the Plaintiff's summons to vary, and ordered the Defendant to pay to the Plaintiff his costs of Defendant's summons to vary.

The judgment, which was for £232 5*s.* 8*d.*, was recovered by the Plaintiff in an action for rent, and was signed on the 20th of November, 1865, before the order for reference was made.

The solicitor of the Defendant had made an affidavit claiming his lien under the statute.

Mr. *Osborne*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff:—

It is perfectly clear that we are entitled to set off our costs of Defendant's summons to vary against the costs of the suit.

[The VICE-CHANCELLOR:—Yes.]

It seems naturally to follow that the compensation we have to pay for damages may be set off against the judgment.

In *Beasley* v. *Darcy* (1) a tenant was allowed to have credit for the damages of taking and cutting timber by the landlord. *Clark* v. *Cort* (2) is an authority to shew that where there are cross demands of such a nature, that, if both were recoverable at law,

(1) 2 Sch. & Lef. 403 (*n*). (2) Cr. & Ph. 154.

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they would be the subject of legal set-off; then, if either of the demands becomes matter of equitable jurisdiction, the set-off will be enforced in equity. Here, the damages, if recoverable at law, would be set off against the rent. It is only accidental, in this instance, that they are matters of equitable jurisdiction.

With regard to the costs of the suit, it is submitted they also may be set off against the judgment.

In *Shine* v. *Gough* (1) the Court permitted the costs of ejectment at law to be set off against costs in equity, which had been awarded on the ground that the suit was instituted to stay proceedings at law. This was allowed, subject only to the solicitor's lien for his costs at law.

There may be a set-off in equity when there can be none at law: *Ex parte Stephens* (2), and *Williams* v. *Davies* (3).

Mr. *Simmonds*, for the Defendant:—

Collett v. *Preston* (4) is a direct authority to shew that where the Defendant has previously sued the Plaintiff at law on a covenant, and been nonsuited, and the Plaintiff then files a bill to have the deed set aside for fraud, which bill is dismissed with costs, the Plaintiff cannot set off his costs in equity against the costs at law, the express ground being that the solicitor's lien would thereby be lost.

The present Defendant's case is stronger than that, because the Plaintiff has been the aggressive party.

In *Holworthy* v. *Mortlock* (5) the set-off was refused on grounds irrespective of the lien of the officer of the Court.

On the question of the solicitor's lien under the 23 & 24 Vict. c. 127, *Bailey* v. *Birchall* (6) and *Haymes* v. *Cooper* (7) were cited.

[He was stopped on the question of the costs of the suit.]

Mr. *Osborne*, in reply:—

The cases cited were not cases of a set-off against a debt. They were costs against costs.

(1) 2 Ball & B. 33.
(2) 11 Ves. 24.
(3) 2 Sim. 461.
(4) 15 Beav. 458.
(5) 1 Cox, 202.
(6) 11 Jur. (N. S.) 57; 2 H. & M. 371.
(7) 33 L. J. (Ch.) 488. 33 Beav. 431. 10 Jur. N. S. 303

The VICE-CHANCELLOR said he would hear the Defendant as to question of setting off the damages in equity against the judgment.

Mr. *Simmonds* referred to *Haymes* v. *Cooper*, and *Sympson* v. *Prothero* (1).

Damages must be considered as part of the costs of the suit.

SIR W. PAGE WOOD, V.C.:

I think, with regard to the Plaintiff's liability of £20 for damages, the case is clear in his favour, because at the very moment when the Defendant in this cause recovers the £20, he has in his pocket money of the Plaintiff's, his landlord, to a much larger amount. Then comes the observation that has been made about the claim of the solicitor. Of course that could not interfere with the decision of the question; but the claim of the solicitor does not arise. If the damages had been much larger, so that the Plaintiff would have had to pay instead of to receive, then the Defendant's solicitor might have had a claim. But it is clear that when there is a person like this Defendant owing you a sum of money in a proceeding, and he afterwards becomes entitled to receive a sum of money from you in another proceeding relative to the same matter, he may set off against your debt the sum for which he subsequently acquires a right against you.

With regard to the costs of the suit, in this instance the bill of the landlord was dismissed with costs, and so far the case is on all fours with *Collett* v. *Preston* (2), which seems to have been decided in conformity with the principle of authorities there cited, namely, that where proceedings are carried on in respect of two different matters, there is no reason why the rules respecting set-off should apply. Where the matters are different, consideration seems due rather to the solicitor than to the client. Here, there is no question of adjusting equities between Defendants in cross suits; it is a question of costs in a suit as against a debt and costs in an action at law, and I think the Plaintiff is not entitled to set off one against the other.

As to the costs of the Defendant's summons to vary, they

(1) 26 L. J. (Ch.) 671. (2) 15 Beav. 458.

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must, I think, be considered as part of the costs of the suit, and may be set off accordingly.

The Plaintiff, therefore, is at liberty to set off the judgment debt against the damages, but not against the costs of the suit; and he is at liberty to set off his costs of the Defendant's summons to vary against the costs of the suit.

Solicitors for the Plaintiff: Messrs. *Ward & Mills.*
Solicitors for the Defendant: Messrs. *Rowden & Stacey.*

V.-C. W. 1866 *Nov.* 19.

ACCIDENTAL AND MARINE INSURANCE COMPANY *v.* MERCATI.

Practice—Security for Costs—Companies Act, 1862, *s.* 69.

Section 69 of the *Companies Act*, 1862, makes no alteration in the principle upon which the Court refuses to allow a Defendant in a cross suit to call upon the Plaintiff in the cross suit to give security for costs; the principle being—not that the Defendant by suing the Plaintiff originally has admitted the jurisdiction, and cannot afterwards question it, but that a person who, though nominally a Plaintiff, is actually a Defendant, will be allowed freely to defend himself.

Where a company, registered under the Act of 1862, was Plaintiff in a suit to set aside a policy on which the Defendant in the suit had already sued the company in an action at law, which was still pending, the Court refused to order the company to give security, although at the time of the application there was a Petition to wind up the company, under which it was afterwards wound up.

Bittson 7 Ch 225 & 11 Jan.

THIS was an adjourned summons by the Defendant, that the Plaintiff company might give security for costs under section 69 of the *Companies Act*, 1862.

The Defendant, *Mercati*, having issued a writ in an action against the company to recover the amount secured on a marine policy, the company, on the 5th of June last, filed this bill to have it declared that the policy was fraudulently obtained from them, and was void; and to restrain the action. Petitions for winding up the company having been presented, the Defendant took out this summons on the 29th of October. On the 3rd of November, an order was made for winding up the company voluntarily under supervision. The action was being prosecuted.

Mr. *A. G. Marten*, for the summons:—

The only point is, whether, in the case of a suit to set aside a policy of assurance for fraud, the circumstance that an action has been brought to recover the proceeds, is one which will induce the Court to consider the suit in the nature of a cross suit, in which it will not require security from the Plaintiff, though out of the jurisdiction.

The particular power conferred by the 69th section of the *Companies Act* is distinguishable from the ordinary course of the Court, which is to refuse to insist upon security being given by a Plaintiff out of the jurisdiction, when the Defendant has himself admitted the jurisdiction by previously suing the Plaintiff.

Section 69 of the *Companies Act* is a special enactment under a special state of circumstances: *Imperial Bank of China* v. *Bank of Hindustan* (1), whereby the Legislature has declared that the above-mentioned principle shall not apply in the case of a company. A company is not to be allowed to say to a Defendant, that because he has brought an action against them they are not to be called upon to give security.

This is not a bill by way of defence to the action, for it is founded on fraud, as to which Courts of law have a concurrent jurisdiction.

Mr. *W. C. Druce*, for the Plaintiff:—

The power given by the section is wholly discretionary.

This company does not stand in the position of a "plaintiff or pursuer," within the meaning of the section. They have been driven here in defence to the action. A suit in defence of an action is in the nature of a cross suit: *Watteeu* v. *Billam* (2).

That the principle on which security is required from a Plaintiff, who is abroad, is not, as stated on the other side, because the Defendant has, by his former proceeding, admitted the jurisdiction, is shewn by *Watteeu* v. *Billam*, where the Plaintiff did not go abroad till after the bill was filed. The true principle is, that a party who is really a Defendant, though nominally a Plaintiff, is not to be hampered in his defence.

(1) Law Rep. 1 Ch. 437. (2) 3 De G. & Sm. 516.

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That the company is being wound up is not a sufficient reason for requiring security, and there is no affidavit of insolvency.

The VICE-CHANCELLOR:—Does not the argument of the Defendant go this length, that a company cannot file a cross bill without being liable to be called upon to give security for costs?

Mr. *Marten*, in reply:—

Undoubtedly. Even if the company were most unjustly assailed, they would not be exempt from the ordinary expenses of litigation. The principle of the Act is, that a litigant with a limited company is to be protected. Here the company is admittedly insolvent, and this is the only period at which the Defendant can intervene.

Watteeu v. *Billam* (1) was an ordinary case of a suit by way of defence.

SIR W. PAGE WOOD, V.C.:—

This section must not be construed so as to put a new construction upon the rule of the Court, or to vary the existing ordinary jurisdiction. The Lords Justices have not indicated any such alteration in the decision referred to, which went simply to this—that when a company is called upon to give security for costs, the security must be substantial, and not merely nominal.

The case before me is that of a Defendant having done that which, in ordinary instances, would have prevented his having the right to come here and ask that security should be given. The absence of an affidavit as to the insolvent condition of the company is immaterial, since the company has been wound up; but the principle upon which the Court refuses to insist upon a Plaintiff, who is abroad, giving security for costs where there is a suit and cross suit, has been very properly stated by Mr. *Druce*. It has been argued that, whenever a company is Plaintiff in a cross suit, this security ought to be given. But in this case, as in *Watteeu* v. *Billam*, the company, though called a Plaintiff, is really a Defendant. The principle is not based on the narrow ground that the Plaintiff in the original suit, having admitted

(1) 3 De G. & Sm. 516.

the jurisdiction, is not at liberty to deny it: the true ground is, that a person who is in the position of a Defendant (though nominally a Plaintiff) is to be at liberty to defend himself. So likewise a person in contempt is considered to be at liberty, in the same way, to ask justice at the hands of the Court. He may defend himself freely, although he is not at liberty to initiate proceedings as Plaintiff, as an ordinary person may.

Where a company is defending itself, it must be regarded as, in substance, a Defendant, and, therefore, is not to be called upon to give security. In this instance the company must be considered as a Defendant, and not as a "plaintiff or pursuer," within the meaning of the Act, this being virtually a cross suit. If the Defendant were to think proper to give up his action, a case for security might possibly arise. But in the present case I do not think security should be given.

The costs of the summons must be dealt with as the costs of an unsuccessful motion.

Solicitors for the Applicant: Messrs. *Thomas & Hollams.*
Solicitors for the Respondents: Messrs. *Waltons & Bubb.*

In re ENGLISH JOINT STOCK BANK.

Practice—Mode of summoning Witness under Winding-up—Companies Act, 1862, *sect.* 115—*Orders of November*, 1862, *Rule* 74, *Form No.* 54.

Where a company is being wound up under the *Companies Act*, 1862, and a special examiner has been appointed, the proper mode of summoning before the examiner "any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," under the 115th section of the Act, is, not by subpœna, but by summons in Chambers.

THIS was a motion on behalf of the liquidators of the *English Joint Stock Bank, Limited*, that *Charles Bradlaugh* might be ordered, at his own expense, to attend the special examiner, who had been appointed in the matter, to be examined "touching the affairs, dealings, estate, and effects," of the company.

Mr. *Bradlaugh* had a claim against the company for a sum of

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£12,350, for commission for services rendered and moneys expended, and for work and labour done by him, as agent of the bank, for which he had brought an action, which was pending on the 11th of May last, when the bank stopped payment. A provisional liquidator was appointed on the 14th, and a winding-up order was subsequently made.

On the 23rd day of October, Mr. *Bradlaugh* was served with a subpœna, commanding him personally to appear before the examiner, and the writ ran as follows: "to testify the truth, according to your knowledge, in a certain matter entitled, &c. (as above), on the part of the liquidators of the above-named bank, and that you, the said *Charles Bradlaugh*, then and there bring with you, and produce, the alleged agreement between you and the said bank, upon and in respect whereof you have made a claim against the said bank, for commission, journeys, and expenses; and all books, papers, and documents, containing any entries, or memorandum of, or relating to, your transactions with the said bank, also all letters and correspondence between you and the said bank, or any or either of the officers thereof."

On the 25th of October, Mr. *Bradlaugh* appeared before the special examiner, and protested against the right of the examiner to examine him, as he was neither a "person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company," nor a "person whom the Court had deemed capable of giving information concerning the trade, dealings, or effects of the company, within the meaning of the 115th section of the *Companies Act*, 1862." At the same time he offered to waive the protest, and to be examined, provided the liquidators would permit him to have copies of the examinations, and also permit him to attend the examinations of the other witnesses called in the case, and cross-examine them, and have copies of their depositions. The liquidators, on the other hand, desired to examine Mr. *Bradlaugh* because they, *acting for the Court*, "deemed him capable" of giving important information concerning the dealings and estate of the company, and of producing papers, &c., and also because he had made an affidavit in the winding-up, and had a claim of his own against the company; and they declined to make any special condition.

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Mr. *Daniel*, Q.C., and Mr. *E. E. Kay*, in support of the motion :—

The authority of the Court to make the order now asked for, is founded on the 115th section of the *Companies Act*, 1862. That section empowers the Court, and hence also the official liquidator, to summon before it and him persons whom the Court, or the liquidator, may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; the object of the statute being to extend the ordinary powers of the Court, by analogy to bankruptcy, in order to call persons as witnesses, who may be bound to disclose matters adverse to their own interests. The present motion follows the course adopted by the Master of the Rolls, in a case where a contributory to a company attended at the examiner's office, in obedience to a subpœna under the 9th rule of the Evidence Orders of the 5th of February, 1861, but refused to allow himself to be sworn, on the ground that forty-eight hours' notice, under the 22nd rule, had not been given. The Master of the Rolls, on motion by the official manager, ordered the witness to attend and be examined at his own expense: *In re North Wheal Exmouth Mining Company* (1).

The VICE-CHANCELLOR :—Should not the witness have been summoned by summons, as directed by No. 54 of the Forms in the 3rd Schedule to the General Orders of the 11th of November, 1862, and not by subpœna?

Mr. *Daniel* :—This is a proceeding before an examiner, not a proceeding in Chambers; it is a case not specially provided for by the *Companies Act*, 1862; hence, by the 74th Order, the general practice applies, and a subpœna is the mode prescribed by the 9th rule of the Chancery Evidence Orders.

In cases of this sort the official liquidator represents the Court. The summons of the liquidator to attend is the summons of the Court; he, and not the intended witness, is the proper person to say whether the intended witness is capable of giving information.

Similar objections were taken by persons summoned under the 120th section of the *Bankrupt Law Consolidation Act*, 1849 (from which the 115th section of the *Companies Act*, 1862, is copied),

(1) 11 W. R. 58.

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and were overruled, in *Ex parte Beeston* (1), and *Ex parte Caldecott* (2).

Mr. *G. M. Giffard*, Q.C., and Mr. *R. Horton Smith*, for Mr. *Bradlaugh*:—

The proceeding which this motion seeks to enforce is wrong in form, and wrong on the merits.

The subpœna states that on which it was proposed to examine Mr. *Bradlaugh*, shewing, on the face of it, that Mr. *Bradlaugh* was sought to be examined, not in respect of any estate or effects of the company, but in respect of a claim of his own against the company.

It has been said that the liquidator, *acting for the Court*, deemed the witness capable, &c. But the liquidator is not the Court, and therefore the intended witness ought to have been summoned by summons, which he might have moved the Court to discharge.

There is no *constat* that he was capable of giving information, At least there should be an affidavit stating that he is capable. In the bankruptcy cases referred to, the witness was summoned before the Court, which was, of course, able to exercise judicial discretion. As a matter of fact, *Bradlaugh* does not come under either of the categories mentioned in the 115th section.

The object of the intended examination was to get evidence upon which to interrogate *Bradlaugh* in the action; and certainly the common law Judges do not encourage a fishing examination of this sort pending an action.

Mr. *Daniel*, in reply:—

The witness has not taken the objection that he was summoned by subpœna instead of by summons. His objection is that he does not come within the 115th section.

The official liquidator is entitled to gain any information he can, in anticipation of an action.

Sir W. Page Wood, V.C.:—

This is a question of some little importance with reference to the course of proceeding as regards persons supposed to be within

(1) Mont. & Mac. 244. (2) Mont. 55.

the operation of the 115th section of the *Companies Act*, 1862. A distinction is taken between persons in that position and ordinary witnesses. The object of the Act, Mr. *Daniel* says, is to compel disclosure by persons who are supposed to be possessed of papers or information concerning matters important to the company, and who are not treated as ordinary witnesses, but as persons who may be bound to disclose matters that may be adverse to their own interests. A subpœna would be the course with regard to an ordinary witness, and, I apprehend, there can be no doubt as to the power of the Court to order any witness, for that purpose, to attend and be examined on a subpœna.

The provisions of the Act are these:—The 170th section says that the Lord Chancellor "may, as often as circumstances require, make such rules concerning the mode of proceeding to be had for winding up a company in the Court of Chancery as may, from time to time, seem necessary; but until such rules are made, the general practice of the Court of Chancery, including the practice hitherto in use in winding up companies, shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding up a company." In pursuance of that section, the Lord Chancellor has made rules, and the 74th of those rules is as follows:—"The general practice of the Court, including the course of proceeding and practice at the Judges' Chambers, as provided by the statute 15 & 16 Vict. c. 80, and the General Orders of the Court relative thereto, shall, in cases not provided for by the *Companies Act* of 1862, or these rules, and so far as the same are applicable, and not inconsistent with the said Act or these rules, apply to all proceedings for winding up a company." The result of that appears to me to be that the Court may, having a case before it under the *Companies Act*, 1862, do exactly as it would do in a case before it in Chancery, and appoint a special examiner upon any inquiries directed by the Court; and before that special examiner every one in the position of an ordinary witness would be subpœnaed to appear and give his evidence on the subpœna. But there is a distinction clearly drawn by the Act between an ordinary witness and a person in the position described in the 115th section, against whom special remedies are directed; and of course a person who believes himself to be summoned under

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that section, has a right to see that the course prescribed by the rule is adopted.

Now the clause is this [His Honour read the 115th section, and continued :—]

Then there are certain modes by which the Court may compel his appearance, and proceed to punish him in default of appearance. In conformity with that, we find that the 54th of the Forms comprised in the 3rd Schedule to the Rules, speaks of the summons which is necessary to compel the attendance of a person under that section. The summons is headed "25 & 26 Vict. c. 89, s. 115. In Chancery, in the matter, &c." It then proceeds :—"*A. B.*, of &c., and *E. F.*, of &c., are hereby severally summoned to attend at the Chambers," &c., "to be examined on the part of the official liquidator, for the purpose of proceedings directed by the Master of the Rolls [or the said Vice-Chancellor] to be taken before me in the above matter," and then he is required to bring with him the documents that may be necessary.

But Mr. *Daniel* says, this is not a proceeding in Chambers at all. It is a proceeding which has been referred to the Chief Clerk, as mentioned in this Form, No. 54 in the Schedule; but in order to facilitate the business of the inquiry at Chambers, a special examiner has been appointed, and, under the 74th rule, the special examiner is at liberty to take every step in the case which is not inconsistent with these rules. It appears to me perfectly consistent with the rule, where the proceeding is in Chambers, and a special examiner has been appointed, to say, you are directed to attend before the special examiner upon summons for the purpose of this matter pending before me in Chambers, following the words of the 115th section; and I confess I think that is the proper course to follow with reference to witnesses in the position in which Mr. *Bradlaugh* is placed. No doubt a very small amount of evidence would satisfy the Court of the necessity of such an order, or possibly, without evidence, the suggestion only of the official liquidator might be sufficient. The statute says, if the person is "known, or suspected to have, in his possession any estate or effects of the company," the Court is to summon him; and, also, if the Court "deem him capable of giving information

concerning the trade, dealings, estate, or effects, of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents, in his custody or power of or relating to the company." I apprehend, under those circumstances, it would not be right or proper that the official liquidator, without any communication whatever with the Judge, should issue the subpœna; because the Court is to say whether it considers that he is capable of giving the information. It does not say the Court is to be satisfied on affidavit. The Court probably would be satisfied with the official liquidator taking on himself the responsibility of informing the Court that there are grave reasons to suppose such evidence could be given. Still I think the section seems to require that there should be some special action by the Court through the medium of a summons at Chambers, pursuant to the terms provided by, and consistent therefore with, the 115th section.

Having the matter now before me, I may as well dispose of the question at once, and say, I will immediately, on application, issue a summons, directing this gentleman to appear. He is bringing an action for commission for business done. How can it be possible to say, that he does not know a great deal of the concerns of this company, and that he ought not to be summoned, because he can give no useful information? As regards his objecting to disclosing any matters which may prejudice him in his action, as to which Mr. *Giffard* says he would be protected, the common law Judges being astute to protect a person as to what may be supposed to be his evidence, and not the evidence of the other side, that is a matter to be raised on a question being asked and being declined to be answered; but I cannot doubt that there is a great deal of important information which he can and ought to give when he is claiming commission as the agent of this company. I should have had no hesitation in granting the order at Chambers, but I think I am bound to give this gentleman the costs of this motion, which is a question of regularity. On this motion he must have his costs. The liquidators will have their costs, because it is a proper question for them to have raised. The liquidators, therefore, will pay the costs, and will take their own costs and the costs they pay out of the fund; and will apply at Chambers, and take a

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summons for Mr. *Bradlaugh* to appear before the special examiner.

Solicitors for the Liquidators: Messrs. *Lawrance, Plews, & Boyer.*
Solicitor for Mr. *Bradlaugh:* Mr. *Harper.*

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MAXWELL *v.* WIGHTWICK.

Practice—Disclaimer—Costs.

In a foreclosure suit the official assignee of the mortgagor having been made a party to the suit, and served with the bill and interrogatories, wrote to say that he claimed no interest whatever in the subject matter of the suit, and that if an answer was insisted upon, he should apply for costs against the Plaintiff. The interrogatories not having been withdrawn, the official assignee put in an answer and disclaimer, and applied at the hearing for his costs:—

Held, that as he had not been content simply to disclaim, but had put in an answer and appeared for the purpose of claiming his costs, he was not entitled to any costs.

IN this suit, which was instituted for the purpose of enforcing the rights of the Plaintiffs, as mortgagees, against certain property comprised in an agreement for a settlement executed upon his marriage by *Raxworthy*, the mortgagor, a question arose as to the costs of the Defendant, *Edwards*, the official assignee of the mortgagor, who was adjudged bankrupt on his own Petition, filed the 7th of July, 1865.

The official assignee having been served with the bill and interrogatories, wrote, by his solicitor, to the Plaintiffs, on the 27th of December, 1865, as follows:—

"As solicitor for the Defendant, *Edwards*, I write to say that he does not claim, and never has claimed, any interest whatever in the subject matter of this suit; under these circumstances I imagine you will not require him to answer the interrogatories which you have served upon him, but that you will at once withdraw the same. Should you, however, decline to do so, and an answer be extorted, I must apply for costs against you, and shall read this letter in support of the application."

The interrogatories not having been withdrawn, an answer and disclaimer was subsequently put in by the official assignee, in which he formally disclaimed all right, title, and interest in the subject matter of the suit, and stated that if any application had been made to him by the Plaintiffs before the bill was filed to disclaim, he would, without suit, have released and disclaimed all interest in the premises. The answer also set out the letter which has been already stated.

Mr. *G. M. Giffard*, Q.C., and Mr. *A. T. Watson*, for the Plaintiffs.

Mr. *Cutler* for the Defendant *Edwards*, contended that, as the Plaintiffs had refused the offer contained in his letter, and had insisted upon getting an answer from him, he was entitled to his costs: *Davis* v. *Whitmore* (1); *Ward* v. *Shakeshaft* (2).

Mr. *Giffard*, in reply:—

The Defendant was not content to disclaim, but by his letter claimed costs, and now comes here to enforce them, and he is, therefore, not entitled to any costs.

SIR W. PAGE WOOD, V.C.:—

When a person by any solemn instrument, or by the act of law, becomes invested with an estate, the Plaintiff is not obliged to make any application to him in order to ascertain whether he claims an interest or not, but is entitled to a disclaimer from him if he claims no interest in the subject matter of the suit. In the case of *Davis* v. *Whitmore* (1) there was a disclaimer in proper form upon the record, by which the Defendants offered to have the bill dismissed against them without costs, but as the Plaintiff chose to bring them to a hearing, the Defendants were allowed their costs subsequent to disclaimer. But in this case the Defendant has put himself out of that rule by coming here to ask for costs; he ought not to receive any, and therefore he will be dismissed without costs.

Solicitors: Messrs. *Wilde, Rees, Humphrey, & Wilde*; Mr. *W. W. Aldridge*.

(1) 28 Beav. 617. (2) 1 Dr. & Sm. 269.

6 Jur. N.S. 880.

V.-C. M.

1866

Dec. 12.

SCOTTO *v.* HERITAGE.

Foreclosure Suit—County Courts Acts—9 & 10 *Vict. c.* 95—28 & 29 *Vict. c.* 99 —*Jurisdiction—Costs.*

In a suit to foreclose a mortgage for £50, where Plaintiff and Defendant lived more than twenty miles apart:—

Held, that the jurisdiction of the Court was concurrent with that of the County Courts, and that the Plaintiff was entitled to a decree of foreclosure with the ordinary costs.

THIS was a suit for the foreclosure of a mortgage for £50.

By an indenture of mortgage, dated the 13th of June, 1863, in consideration of £50 paid to *Isaac Hughes* by the Plaintiff, certain messuages and premises at *Marsh Gibbon*, in *Buckinghamshire*, were conveyed by *Isaac Hughes* to the Plaintiff, subject to redemption on payment of the said sum of £50, with interest at £6 per cent. The premises included in the mortgage were subject to a prior mortgage for £250, and by an indenture dated the 1st of October, 1864, the said premises were conveyed to *Richard Heritage*, the father of the Defendant, *Joseph Heritage*, in consideration of the sum of £350, which sum was to be applied in paying off the two mortgages of £250 and £50, and the remaining £50 was to be paid to *Isaac Hughes*.

The latter deed was executed by all parties except *Richard Heritage*. The respective sums of £250, due upon the first mortgage, and the £50 due to *Isaac Hughes*, were paid by *Richard Heritage*, but the £50 due to the Plaintiff upon his mortgage was not paid, and the title deeds which were delivered up by the first mortgagees were placed in the hands of a solicitor, to be held by him until the said £50 should have been paid to the Plaintiff.

Richard Heritage took possession of the premises upon the execution of the deed of October, 1864, and died on the 5th of April, 1865, intestate as to all his real estate, leaving the Defendant, *Joseph Heritage*, his eldest son and heir, him surviving, but having duly executed a will relating to his personal estate, and having made the two Defendants, *T. Harding* and *T. Parker*, executors thereof.

Application was then made to *Joseph Heritage*, the Defendant, to pay off the £50 due on the mortgage to the Plaintiff, but he refused to do so, on the ground that the hereditaments included in such mortgage were entitled to be exonerated and discharged of the mortgage debt out of the personal estate of *Richard Heritage*.

This bill was therefore filed to foreclose the mortgage in the usual form. The interest due upon the £50 amounted to about £6.

The Defendant, *Joseph Heritage*, by his answer, submitted that the executors of his father were the proper persons to pay the said sum of £50 to the Plaintiff; that the suit was vexatious, and that the Plaintiff had, as against him, no right to institute the same; that the proper remedy (if any) of the Plaintiff would have been in the County Court, and that the suit ought to be dismissed with costs. And he claimed the same right with reference to such objections as if he had demurred or pleaded to the bill.

It was admitted by the Defendant's counsel that this was a proper case for foreclosure, and the only question argued was whether the proceedings should not have been instituted in the County Court. The Plaintiff and Defendant resided more than twenty miles apart.

Mr. *Glasse*, Q.C., and Mr. *Joyce*, for the Plaintiff:—

There is no exclusive jurisdiction given by the *County Courts Act* in cases of this nature. The fresh jurisdiction given to the County Court cannot oust the jurisdiction of this Court. By the 128th section of the original *County Court Act* (1), it is provided that all actions and proceedings which, before the passing of the Act, might have been brought in any of the superior Courts of record, where the Plaintiff dwells more than twenty miles from the Defendant, or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the Court within which the Defendant dwells or carries on his business at the time of the action brought, may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this Act had not been passed. In this case the Plaintiff and Defendant reside much more than twenty miles apart; consequently the Plaintiff had his election as to

(1) 9 & 10 Vict. c. 95.

(a) Repealed by the County Court Act 1867 (30-31 Vict. c. 142). S. 33. Sched.

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whether he would sue in the County Court or in one of the superior Courts. In the case of *Lake* v. *Butler* (1) it was admitted that the superior Court had a concurrent jurisdiction with the County Court; but a question arose as to costs on the ground that the Plaintiff and Defendant resided less than twenty miles apart. The Court of Queen's Bench decided that the distance was to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access, and in *Bennett* v. *Benham* (2) it was held that the superior Courts have concurrent jurisdiction with the County Court, if only one of several Plaintiffs dwells more than twenty miles from the Defendant. This view is confirmed by the effect of the 129th section of the Act, which states, that if any action shall be commenced after the passing of the Act in any of the superior Courts for which a plaint might have been entered in any County Court, and a verdict shall be found for the Plaintiff for a sum less than £20, if the action is founded on contract, or less than £5 if it be founded on tort, the Plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the Plaintiff, the Defendant shall be entitled to his costs as between attorney and client, unless, in either case, the Judge who shall try the cause shall certify that the action was fit to be brought in such superior Court. There is nothing in the recent *County Court Equity Jurisdiction Act* (3) to alter the provisions of the former Act, and that there is a concurrent jurisdiction is the opinion of a compiler of the Acts (*Chitty's* Statutes, by *Horatio Lloyd*), where it is stated:—"The concurrent jurisdiction exists under this section where the Defendant dwells beyond the twenty miles."

It is clear, therefore, that this Court, in a case like the present, has concurrent jurisdiction with the County Court; and as to the amount of costs, the Plaintiff in a foreclosure suit is just as much entitled to his full costs as he is to his mortgage money and interest, the estate being as much a security for one as the other: *Owen* v. *Griffith* (4). The Plaintiff was justified in coming to this Court, and it is the proper tribunal, since there is no machinery in the County Court for enforcing an answer in a foreclosure suit, and the

(1) 5 E. & B. 92.
(2) 33 L. J. (C. P.) 153.
(3) 28 & 29 Vict. c. 99.
(4) 1 Ves. Sen. 250.

Defendant might have stopped the proceedings at any time by paying the £50 and interest.

Mr. *Eddis*, for the Defendant:—

There is no doubt about the Plaintiff's right in this case to have foreclosure of his mortgage; but, even if the jurisdiction of this Court is concurrent with that of the County Courts, the Plaintiff was not justified, where the amount in dispute was so trifling, to put the Defendant to the expense of a bill in Chancery, when the Legislature has provided a speedy and inexpensive mode by which he might have obtained his object. There was no substantial opposition to the Plaintiff's claim for the mortgage money, but there was a dispute between the parties as to the liability of the Defendant to pay interest, and upon this ground a delay occurred, whereupon the Plaintiff, without notice of his intention, at once filed this bill for foreclosure. In a case like this the Court has full power to deal with the costs as it may think fit, and, considering the circumstances under which the bill was filed, the Court will be justified in refusing the costs, or, at any rate, in giving Plaintiff such an amount of costs only as would have been incurred by having recourse to the County Court.

Mr. *Everett*, as *amicus curiæ*, referred to a case of specific performance lately decided by Vice-Chancellor *Wood*, in which the amount was £200, and His Honour considered that the jurisdiction of the superior Court was not ousted by the *County Court Act;* but costs were not given.

VICE-CHANCELLOR MALINS:—

The amount in dispute in this suit is no doubt very trifling, but the question is an important one. It is admitted by the Defendant's counsel that Mr. *Lloyd's* note at the foot of the *County Courts Act* is correct—that the superior Courts of equity retain a concurrent jurisdiction, and that the Plaintiff is unfettered in the choice of his tribunal. I may regret that there is not some restriction in the Act of 1865, ousting the jurisdiction of this Court when the amount in question is very small; but, as there is no such restriction, I am bound to say that the jurisdiction of this Court is con-

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current with that of the County Court. That being so, I must consider what is the state of the law with respect to legal proceedings, under the Act of 9 & 10 Vict. c. 95. These points are settled by the authorities cited: that where the Plaintiff and Defendant reside at a distance of more than twenty miles apart, the Plaintiff is at liberty to resort to the superior Courts, and may proceed as if the Act had not been passed; and by the case of *Bennett* v. *Benham* (1), that right is extended to where one only of several Plaintiffs may reside beyond twenty miles from the Defendant, and the others are within that distance. Under such circumstances, the Plaintiff will be entitled to the ordinary costs of the suit. Then there is, by the 129th section of the Act, a restriction which shews the sense in which the Legislature intended the 128th section to be taken, namely, that if an action shall be commenced in the superior Courts for which a plaint might have been entered in any County Court, and a verdict shall be found for the Plaintiff for a sum less than £20, if the action is founded on contract, or less than £5 if it be founded on tort, then the Plaintiff shall have no costs; from which it follows that if he should recover more than those amounts respectively, he would be entitled to full costs. Now, the matter being left open by the original Act, and there being nothing in the Act of 1865 making it obligatory on the Plaintiff to go to the County Court, I am bound to come to the conclusion that the Plaintiff was at liberty to come to this Court.

Then with respect to the costs of the suit, the question is, whether in this particular case the Plaintiff ought to have his costs. It has been stated that in a case before Vice-Chancellor *Wood*, where the bill was for specific performance in a matter amounting to £200, His Honour considered that the jurisdiction of the superior Court was not ousted, and no costs were then given; but the probability is, that that arose from the merits of the case, when the principle would be the same whatever might be the amount of the sum in dispute.

If, then, the Plaintiff is at liberty to come to this Court, he has come in the most simple form, with a common bill of foreclosure, where there is no question in dispute except as to the amount of

(1) 33 L. J. (C. P.) 153.

interest due, and though my first impression was unfavourable to the Plaintiff, I am by no means satisfied that, having regard to the distance between the residence of the Plaintiff and Defendant, and the necessity there would have been for employing an agent in the country, that the proceedings in the County Court would have been less expensive than in this Court. I am sorry to see that such expenses should have been incurred; but there is no excuse for the Defendant in having resisted the claim. The property was purchased by *Richard Heritage*, and all the purchase-money was paid except this £50, which he was bound to pay. The deed was executed and ready to be delivered as soon as the remaining £50 was paid. The Defendant may argue that the suit should not have been brought in this Court, but the Plaintiff must have some remedy, and what else could he do but file a bill of foreclosure? The Defendant should not have resisted the claim, or he might have paid the money at once and moved to stay proceedings; but no step was taken by him, and on the contrary, an answer was filed and evidence gone into, which, of course, increased the expense, and all for this ridiculous question of a few pounds of interest. Under all the circumstances, I think the Plaintiff is entitled to the common decree of foreclosure, which will include the costs of the suit.

Solicitor for the Plaintiff: Mr. *J. J. Rae.*
Solicitor for the Defendant: Messrs. *N., C., & C. Milne.*

M.R.
1866
Dec. 17.
1867
Jan. 15.

HOWARD *v.* EARL OF SHREWSBURY.

Act of Parliament—Investment in Lands—Sanction of Court of Chancery—Fraud on Court—Setting aside Order—Legal Question—Defective Recovery.

Where an investment, under the provisions of an Act of Parliament, has been made in lands, with the sanction of the Court of Chancery, that Court, and not a Court of law, is the proper tribunal to determine a question of title to these lands, depending on the validity of its own orders.

The Court will not set aside an order which was made in a matter properly within its cognizance and which has not been appealed against, provided the facts were duly laid before the Court when the order was made; except where the error of the Court is so broad and palpable, that it is manifest that the Court must have miscarried.

Where a tenant in tail has entered into a contract for the sale of his estates for value, and in order to convey them to the purchaser, has suffered a recovery which turns out to be technically defective at law, the Court will not allow persons claiming under him to take advantage of the flaw.

Rev'd 1 H. & M. 2 Ch. 760

BY an Act of Parliament, 6 Geo. 1, c. 29, passed in 1719, certain hereditaments were settled to the use of *Gilbert* Earl of *Shrewsbury* for life, and, after his decease, to the use of his first and other sons severally and successively in tail male, and, for default of such issue, to the use of all and every person and persons being issue male of the body of *John* first Earl of *Shrewsbury*, to whom the title, honour, and dignity of Earl of *Shrewsbury* should, by virtue of the letters-patent of creation of the Earldom, descend, severally and successively in tail male, so as to be annexed to and descend with the Earldom. And it was enacted that no person becoming entitled to an estate of inheritance in such hereditaments by virtue of the Act should be at liberty to alienate the same: provided always, that no person who should, by virtue of the Act, become entitled to such an estate of inheritance, who should, within six months after attaining the age of eighteen, take the oaths of supremacy and allegiance, and subscribe the declaration prescribed by the Act, 30 Car. 2, c. 2, and should thenceforth continue a Protestant until he attained the age of twenty-one years, should, after attaining such age, and while he continued a Protestant, be disabled from alienating the hereditaments thereby settled.

By an Act, 43 Geo. 3, c. 40, passed in 1803, part of the hereditaments settled by the 6 Geo. 1, c. 29, were vested in trustees in fee upon trusts for sale; and the proceeds of such sales were thereby directed to be laid out and invested by or under the order and direction of the Court of Chancery in the purchase of real estates to be settled to the uses, and under and subject to the restrictions from alienation, to and under and subject to which the hereditaments annexed to the Earldom of *Shrewsbury* then stood settled and limited by virtue of the Act 6 Geo. 1, c. 29; and in the meantime, until such reinvestment should take place, the proceeds of the sales were to be paid into Court to an account "*Ex parte* the Purchaser or Purchasers of the Estate or Estates of the Earl of *Shrewsbury*," and laid out in the purchase of exchequer bills.

Under this Act various sales were from time to time made, and the proceeds thereof paid into Court, and in the month of July, 1832, a sum of £1664 3*s.* 4*d.* cash was standing in the name of the Accountant-General to the above-named account.

In or about 1824, *Charles*, the then Earl of *Shrewsbury*, formed a scheme (as was alleged by the bill in this suit) for the purpose of bringing estates of very much greater value than the purchase-money to be paid for them under the operation of the restrictions against alienation contained in the Act 6 Geo. 1, c. 29. With this view, and after having been advised as to the feasibility of the plan by the late Vice-Chancellor *Shadwell*, then at the bar, he entered into an agreement in writing, dated the 20th of July, 1824, with the trustees for the time being of the Act 43 Geo. 3, c. 40, for the sale to them of certain hereditaments at the price of £1000.

These hereditaments were three undivided fifth parts of the manor of *Little Neston*, in the county of *Chester*, the manor of *Cooksey*, in the county of *Worcester*, and all the *Prestwood* estate, in the county of *Stafford;* and also all other the hereditaments whereof *Charles* Earl of *Shrewsbury* was seised in fee simple, situate, lying, being, or arising in the counties of *Chester* and *Worcester*, or either of the same counties. Of these hereditaments Earl *Charles*, at the date of the contract, believed himself to be seised in fee, but on investigating the title it was discovered that he was seised of part as tenant in tail male, and of the residue as tenant in fee.

Shortly afterwards a Petition was presented by the trustees

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for the purpose of obtaining the sanction of the Court to the proposed purchase, and it came on to be heard before Lord *Gifford*, M.R., on the 11th of August, 1824, when an order was made referring it to the Master, to inquire whether it was proper that the contract should be carried into effect, with the usual directions for that purpose, and for investigating the title to the hereditaments comprised in the contract. On this occasion Mr. *Shadwell* appeared for the Petitioners, and Mr. *Tinney* for *Charles* Earl of *Shrewsbury*, who was a Respondent. The briefs used by them had been preserved, and on that of Mr. *Tinney* was the following memorandum signed by him:—"Mr. *Shadwell* stated that the difficulty suggested was, that if the estates were not sold at their full value it might tend to create a perpetuity beyond the purview of the Act; but he said the Act of Geo. 3 did not prohibit the trustees from making an advantageous bargain; and the perpetuity would be only such a perpetuity as the Acts sanctioned."

On Mr. *Shadwell's* brief was the following indorsement—"Ord$^{d.}$ upon stating the point to his L$^{dp.}$ Aug$^{t.}$ 11, 1824."

Earl *Charles* died on the 6th of April, 1827, without having taken any further steps to carry out the alleged scheme. He was succeeded in the title, and also in all the estates of which he was seised in tail, by his nephew, Earl *John*, to whom he had devised his fee simple estates. Earl *John* adopted the contract of 1824, and took proceedings for carrying into effect the order of August, 1824. Accordingly the Master made his report, dated the 21st of July, 1832, finding that the above-mentioned hereditaments were worth the sum of £1000, and were fit and proper purchases wherein to invest the sum of £1000, part of the above-mentioned sum of £1664 3*s.* 4*d.*, and that a good title could be made thereto. The only evidence as to the value of the estates submitted to the Master was the affidavit of *William Blount*, a land surveyor, who deposed that the hereditaments in question, the particulars of which were set out in a schedule annexed to the affidavit, and described as comprising 1983 acres of land, were fully worth the sum of £1000. By another order of the Court, made on the Petition of the trustees, and dated the 27th of July, 1832, the report was confirmed, and it was referred to the Master to approve of proper conveyances of the property. Indentures of lease and release, bearing date the 1st

and 2nd of November, 1832, were accordingly prepared, and approved of by the Master, whereby *John* Earl of *Shrewsbury* conveyed, first, *Henbrook* farm and *Bungaylake* farm, in the county of *Worcester*, and the *Prestwood* estate, in the county of *Stafford*, which hereditaments were more particularly described in the first schedule thereto, and all other hereditaments (if any) particularly described in the said first schedule, and also all and singular other the messuages or tenements, lands or hereditaments whereof or wherein *John* Earl of *Shrewsbury* was at the time of the execution thereof seised for an estate in fee simple, as devisee under the will of *Charles*, late Earl of *Shrewsbury*, situate, lying, and being in the several counties of *Stafford*, *Chester*, and *Worcester*, or any or either of them; and, secondly, the manor of *Cooksey* and certain hereditaments at *Bellbroughton*, in the county of *Worcester*, and three undivided fifth parts of the manor of *Little Neston*, in the county of *Chester*, which hereditaments were more particularly described in the second schedule thereto, and also all other (if any) the hereditaments particularly described in the said second schedule, and all other the hereditaments whereof or wherein *John* Earl of *Shrewsbury* was seised of an estate in tail male, situate, lying, and being in the counties of *Stafford*, *Chester*, and *Worcester*, or any or either of them, to *John Wright* and *James Hurtle Fisher*, and their heirs, to the use of *Thomas Rhodes*, and his heirs, to the intent that he might become a perfect tenant to the *præcipe*, in order that recoveries might be suffered of the premises in favour of *John Wright* and *James Hurtle Fisher*: and it was agreed that such recoveries should enure, and that *John Wright* and *James Hurtle Fisher*, and the survivor of them, and their or his heirs, should stand seised of the premises to the uses, and subject to the restrictions from alienation to and subject to which the hereditaments comprised in and vested by the Act 43 Geo. 3, c. 40, would then have stood limited and settled by virtue of the Act 6 Geo. 1, c. 29, if the Act 43 Geo. 3, c. 40, had not passed. The schedules comprised the lands which were the subject of Mr. *Blount's* affidavit. Under the general words certain estates passed which were not specifically referred to in the affidavit or the report. The value of the property comprised in the schedules was estimated at about £89,000, and of that which passed by the general words at about £47,000.

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Throughout these transactions, one of the trustees of the Act 43 Geo. 3, c. 40, was *James Hurtle Fisher*, who was one of the partners in the firm of *Fisher & Rhodes*, solicitors, up to the year 1832, when he retired therefrom. Up to that year, the firm of *Fisher & Rhodes*, and subsequently Mr. *Rhodes* alone, acted as solicitors both for the Earl of *Shrewsbury* and for the trustees.

No exemplification could be found of a recovery suffered in pursuance of the deeds of 1832: but in the Prothonotary's book, deposited at the Record Office, an entry was found of a recovery of certain estates in *Cheshire* and *Warwickshire*, suffered by *John* Earl of *Shrewsbury*, in Hilary Term, 1833. It was contended that this entry was merely evidence of the appearance of the tenant to the *præcipe* at the bar of the Court of Common Pleas; and was not sufficient to prove that a writ of seisin had been issued, so as to complete the recovery (1).

By an Act, 6 & 7 Vict. c. 28, passed in 1843, certain parts of the estates annexed to the Earldom of *Shrewsbury*, by the Act 6 Geo. 1, c. 29, and also about eleven acres of land which passed by the conveyance of 1832, were vested in trustees, upon trust for sale. By the 32nd section of the same Act, the proviso contained in the Act 6 Geo. 1, c. 29, enabling Protestant Earls of *Shrewsbury* to alienate the estates, was repealed. By section 40, powers of leasing certain lands therein specified, and comprising lands which passed under the conveyance of 1832, were conferred on the trustees of the Act.

John Earl of *Shrewsbury*, died in 1852, having devised and bequeathed all his real and personal estates to *Ambrose Lisle Phillips* and *Charles Robert Scott Murray*, subject to a proviso that the Earl of *Shrewsbury* succeeding him should be entitled to purchase his unsettled real estates (except as therein mentioned), and certain specified personal chattels, at the price and upon the terms therein mentioned. He was succeeded in the Earldom by *Bertram* Earl of *Shrewsbury*, who at the time of his accession was a minor, but the right of purchase conferred by the will of Earl *John* was exercised on his behalf by the Court of Chancery, and he became the owner of the unsettled real estates and the personal chattels of Earl *John*. He would also, if no recovery had been suffered by Earl *John*, have

(1) See Hands on Fines and Recoveries, 4th ed. p. 27.

become tenant in tail of the estates comprised in the contract of 1824, of which Earl *John* was tenant in tail.

In 1855 and 1856 Earl *Bertram* executed two disentailing deeds, by means of which he became entitled in fee simple to all the estates of which he had previously been tenant in tail: and by his will he devised all his real estate to Mr. *Hope Scott* and Serjeant *Bellasis* for a term of 1000 years, upon certain trusts, and subject thereto to the Plaintiffs in this suit.

Earl *Bertram* died in 1856; and upon his death the Earldom of *Shrewsbury* and the estates annexed thereto devolved upon *Henry John Chetwynd* Earl *Talbot*, the principal Defendant to this suit. The other Defendants were Mr. *Hope Scott* and Serjeant *Bellasis*, the trustees of the term of 1000 years, and *Wm. Salt* and Lord *Dynevor*, the trustees of the Acts 43 Geo. 3, c. 40, and 6 & 7 Vict. c. 28, in whose possession were the title deeds relating to the property in question.

The bill prayed for a declaration that the Act 43 Geo. 3, c. 40, did not authorize the purchasing and settling of estates other than estates being a just equivalent for and *bonâ fide* purchased out of proceeds of sales made under the provisions of that Act; that the contract of the 20th of July, 1824, was not a *bonâ fide* contract of purchase under the provisions of that Act; that the estates comprised therein were not effectually inalienably settled by the indentures of the 1st and 2nd of November, 1832; that such indentures only operated as a conveyance and settlement of the estates therein comprised to the uses of the Act 6 Geo. 1, c. 29, other than the restrictions against alienation: that Earl *Bertram* became entitled to the estates for an estate in fee simple, and that they passed under the general devise in his will; or otherwise, that the said indentures might be set aside, and the estates comprised therein might be decreed to be held and enjoyed as if they had not been executed; the Plaintiffs in either case submitting to pay and restore to the trust funds such sum as the Court should deem just: or if such relief could not be granted, that it might be declared that any estates appearing to have been improperly included in the said indentures were improperly comprised therein, and that a decree might be made for giving effect to such declaration by reducing the operation, or rectifying such indentures, or in such other

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manner as might be deemed proper in that behalf. It also sought an account of the rents and profits; and for relief and discovery with respect to the title deeds.

A suit was also instituted by *Ambrose Lisle Phillipps* and *Charles Robert Scott Murray*, who claimed to be entitled to the same hereditaments as devisees under the will of Earl *John*, contending that the hereditaments in question formed no part of the "unsettled" estates of Earl *John*. This suit was compromised, with the sanction of the Court; and in accordance with the terms of such compromise, *Phillipps* and *Murray* made over all their interest in the hereditaments to the Plaintiffs. The compromise was brought before the Court by a supplemental bill, to which *Phillipps* and *Murray* were parties.

Sir *Roundell Palmer*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs:—

The object of the suit is to get relief against the attempt made by Earl *John* to bring certain estates under the fetters of the parliamentary entail of 1719; an object which nothing short of an Act of Parliament could effect. The attempt was made through the instrumentality of the Court of Chancery; but it is quite clear that the Court was never informed of the true facts of the case. The order was made on a consent petition, the same solicitors appearing on behalf of both Petitioners and Respondents. The contract, which was the foundation of the whole transaction, was not a contract for value: it constituted a gift to the trustees; and though the trustees were not prohibited, as Mr. *Shadwell* is said to have observed at the hearing of the Petition, from making an advantageous bargain, still it must be a *bargain*, which this was not. It is impossible to hold that the proceedings before the Court, under these circumstances, were of a judicial nature: even if they were, the decision is clearly wrong, for the Court could not authorize a transaction contrary to the policy of the law. Even if it were possible that the transaction could be upheld as to the lands comprised in the contract, still the conveyance comprised estates of large value which the Court never authorized the trustees to purchase. As to these, the deeds should be rectified.

Further, we contend that as to the entailed estates comprised in

the contract, a valid recovery was never suffered. It is necessary, to perfect a recovery, that a writ of seisin should issue: *Witham* v. *Lord Derby* (1); *Aubrey* v. *Lord Bridgewater* (2); *Sheppard's* Touchstone (3); and in this case none issued. It may be argued that this defect is cured by the statute 14 Geo. 2, c. 20; but there is nothing in that Act to provide against the want of a writ of seisin: and besides, it only applies to purchases for value, which this is not.

Mr. *Selwyn*, Q.C., and Mr. *Badeley*, for the Defendants, Mr. *Hope Scott* and Mr. Serjeant *Bellasis*.

The *Attorney-General* (Sir *John Rolt*), Mr. *Giffard*, Q.C., and Mr. *Wickens*, for the Earl of *Shrewsbury*:—

We say, in the first place, that the whole case is one for a Court of law. The construction of the Act 43 Geo. 3, c. 40, on which the main question depends, is the same in a Court of law as in a Court of equity. If this Court cannot hold the transaction to be a sale within the reasoning of that Act, neither could a Court of law. The same reasoning applies still more forcibly to the question as to the validity of the recovery.

But if we are to go into the merits, then there was no concealment of any of the facts so as to constitute a fraud on the Court. The case in this respect differs very much from *Brydges* v. *Branfill* (4). It must have been stated to the Court by Mr. *Shadwell* that the value of the estates proposed to be purchased was much greater than £1000; and we know that the Master had before him an affidavit containing a schedule of lands to the extent of 1983 acres. No one could ever suppose that he could buy so much land in *Cheshire* or *Worcestershire* for £1000.

Again, the transaction was a sale, not a gift. Valuable consideration was given, and that is enough. The Court will not go into the question whether the amount of consideration was sufficient: *Townend* v. *Toker* (5). Suppose the trustees had purchased a quantity of waste land and improved it, could such a purchase have

(1) 1 Wils. 48, 55.
(2) Sir W. Jones, 10.
(3) Page 40.
(4) 12 Sim. 369.
(5) Law Rep. 1 Ch. 446. 12 Jur. N.S. 477

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been set aside? It is said that the transaction is contrary to the policy of the law. But the Act 6 Geo. 1, c. 29, was part of the law. Whoever brought more land under the operation of it was acting not against the policy of the law, but in accordance with it. [They referred to *Richardson* v. *Mellish* (1); *Hibblewhite* v. *McMorine* (2).]

But if there was any fraud it was committed by Earl *John*. The Plaintiffs claim under him, and the case therefore stands in the same position as if he were Plaintiff. He could not have been heard to say that he had committed a fraud, no more can the Plaintiffs.

Finally, the Act 6 & 7 Vict. c. 28, refers to part of the lands in question, and empowers the trustees to sell and grant leases of them. It thus indirectly recognises the validity of the transaction.

Mr. *W. M. James*, Q.C., and Mr. *Kekewich*, for Mr. *Salt* and Lord *Dynevor*.

Mr. *W. J. Bovill*, for *Phillipps* and *Murray*.

Mr. *Charles Hall*, in reply:—

It was necessary to come to the Court to obtain the title deeds, and an account of the rents and profits; also in order that complete justice might be done by repaying to the trust fund the money taken from it. Again, the transaction had its origin in this Court, and if we went to law it would either be said that the order of this Court was a bar to our proceeding there, or a bill would be filed to restrain us. As to the question of the recovery, the effect of the deed of 1832 was to vest a legal estate in *Thomas Rhodes*, which is outstanding in him, and the estates of the Plaintiffs are therefore equitable only.

The case must be treated as if a person had attempted to tie up his lands inalienably. Thus, if a stranger had conveyed lands to the uses of the Act of 6 Geo. 1, c. 29, there can be no doubt that any tenant in tail might have barred the entail. Can it make any difference that the land was so conveyed by one of the Earls of *Shrews-*

(1) 2 Bing. 229. (2) 5 M. & W. 462.

bury? It is therefore no objection that the Plaintiffs claim under the person who made the conveyance complained of. The testator of the Plaintiffs barred the entail, and thus became tenant in fee, and we succeed to his rights. In all cases of attempting to create a perpetuity the interest of the public requires that the person who does the wrong should be able himself to take advantage of his wrong doing. So in cases of mortmain, or of restraint of trade: *Mitchel* v. *Reynolds* (1).

1867

Jan. 15. LORD ROMILLY, M.R.:—

The bill in this suit complains of an improper use having been made of a private Act of Parliament, passed in the forty-third year of Geo. 3, which was intended solely for the purpose of enabling the Earl of *Shrewsbury* to sell certain lands or hereditaments settled by Parliamentary settlement, and to invest the proceeds in the purchase of other lands of similar value; and that this Act has been employed for the purpose of putting lands of a far greater quantity and value into the Parliamentary settlement than were intended to be subject to it. The bill seeks a declaration that this object was not authorized by the Act, and that the lands and hereditaments so attempted to be settled were not effectually made subject to the Parliamentary settlement, and that they remained subject to the original settlement of those lands, under which *Bertram*, the late Earl of *Shrewsbury*, was tenant in tail; and that under a disentailing deed subsequently executed by Earl *Bertram* he became tenant in fee simple of them; and that under the devise contained in his will they have passed to, and are now vested in, the Plaintiffs.

All that which is complained of has been accomplished through the instrumentality of orders made by the Court of Chancery, intended, at least by the Judge who pronounced them, to be in pursuance of the provisions of the Act. The bill suggests that these orders were obtained by suppression of the real facts of the case, the same solicitor being employed on both sides; and that the Court was unwittingly made the instrument of fraud, as in the

(1) 1 P. Wms. 181.

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well-known case of *Brydges* v. *Branfill*; and that when the real circumstances are revealed the Court will restore the parties to the position in which they would have been in case the provisions of the Act had been rigidly enforced, and the rules of the Court strictly complied with. This is the first question, and, if valid, disposes of the whole case.

The second question is this: Part of the estate included in the contract I am about to mention was land of which Earl *Charles* was seised as tenant in tail, and after his death Earl *John* was also possessed of them as tenant in tail. In order to carry the contract into effect, Earl *John* suffered a recovery, but it appears that no recovery is entered on the record, and that no writ of seisin issued. The fact, therefore, of the entail being barred is contested by the Plaintiffs, who allege that the recovery was never perfect in law, and that this defect is not cured by the statute 14 Geo. 2, c. 20, s. 4.

To both these questions a preliminary objection is urged on behalf of the Defendant, which I think it convenient to dispose of in the first instance. It is urged that this is a case solely for the consideration of a Court of law; that the Plaintiff's remedy is by ejectment: that if the Act does not authorize what has been done, the construction of the Act being the same at law and in equity, the ejectment will succeed, and this Court will not interfere. So also it is urged that if the recovery is inefficacious by reason of the informality above mentioned, this is strictly a legal question, which can be disposed of at law more properly than in equity.

So far as regards the first question, I think that this objection is not valid. The Act requires its provisions to be enforced by application to the Court of Chancery. This has been done, and I think that the Court of Chancery is the proper tribunal (subject, of course, to the right of appeal to the House of Lords) for determining the propriety of the orders it has made. If, by some accident, the legal estate had been vested in the Plaintiffs, I think the Court of Chancery would, on a proper application, have restrained the further prosecution of an action of ejectment, and would have withdrawn from the consideration of the Courts of law the question how far the orders made by the Court of Chancery were or were not binding on the parties who obtained and who appeared

upon them, and also upon all those who claim by, through, or under these persons.

I am of opinion, therefore, that this suit, so far as the jurisdiction is concerned, is brought before the proper tribunal for determining the questions at issue between the parties.

The facts which raise the questions in this suit are shortly these :—

In the year 1719 an Act passed which annexed the estate and hereditaments of the late Duke of *Shrewsbury* to the Earldom of *Shrewsbury*. The provisions of it settled them on *Gilbert* Earl of *Shrewsbury*, and the heirs of his body, and in default of such issue to the issue of the first Earl of *Shrewsbury*, to whom the Earldom should descend, to be annexed to the Earldom, and not to be alienated by them or any of them, coupled, nevertheless, with a proviso that the restriction against alienation was not intended to extend to any person who should, within six months after he attained the age of eighteen years, become a Protestant, take the oaths of supremacy and allegiance, sign the declaration of conformity required by the statute of 30 Charles 2, and continue a Protestant. In the forty-third year of the reign of Geo. 3 (May, 1803) another Act was passed, the provisions of which, the bill alleges, were perverted from their legitimate object. By this Act part of the estates settled by the last mentioned Act was vested in trustees to be sold, and the Act directed that the moneys to arise from such sale should be invested in the purchase of other lands and hereditaments, to be settled in the place of those sold to the same uses, and subject to the same restrictions, as the lands included within the provisions of the first Act.

At this time Earl *Charles* was the Earl of *Shrewsbury*, and was possessed of the Parliamentary settled estates, and also of other estates attached to the Earldom which he had the power of alienating. Of some of these he was tenant in fee simple, and of others he was tenant in tail male. He thereupon, in conjunction with the trustees named in the Act of Parliament, formed a scheme to put into the Parliamentary and inalienable settlement lands and hereditaments of a far greater value than those which the trustees were authorized to sell and exchange; and, in furtherance of this design, on the 20th of July, 1824, he entered into a contract with

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the trustees to convey to them certain lands and hereditaments therein mentioned, of which he was tenant in fee simple, and others of which he was tenant in tail male, which were of the value, roughly estimated, of about £85,000 or £89,000, for the price or sum of £1000, being part of the purchase-money invested in exchequer bills derived from the lands in settlement, sold under the powers of the Act.

In the month of August, 1824, a petition was brought before the Court for this purpose, and on it an order, dated the 11th of that month, was made, referring it to the Master to ascertain whether the contract was proper to be carried into execution. What passed on the occasion of making this order is very important. If, as in *Brydges* v. *Branfill*, the real facts were suppressed, and the Court was misled into making an order that it would never have made if the truth had been revealed, then I am of opinion that this Court, when the matter is again brought before its notice, ought to treat such order as a nullity, and proceed to redress the consequences that have flowed from it; but if the matter be properly cognizable by the Court of Chancery, and if the facts which raise the question were duly laid before the Court, and the Court thereupon pronounced its decision upon the question so raised, then I think that such order is binding upon the same Court thenceforward until it comes before a Court of Appeal. It is true that this may be occasionally subject to qualification, when the error of the Court is so broad and palpable that it is manifest that it must have miscarried. Bearing this principle in view, it is fit to examine this order, which is the foundation of the whole proceeding complained of. In the first place, I am of opinion, on the evidence, that the matter was done openly, and that there was no concealment of any material fact. The intention which Earl *Charles* had of putting these lands in settlement, and of subjecting them to the parliamentary restriction was avowed, and a case was laid before the late Vice-Chancellor, then Mr. *Shadwell*, as to the feasibility of its accomplishment. In consequence of his advice the petition I have referred to was presented. What occurred on the occasion of its being heard might have been surmised without direct testimony; because, not only Mr. *Shadwell* would not have lent himself to a fraud upon the Court, but he also must have

foreseen that the only mode of making the matter binding was by obtaining judicial sanction to the transaction in all its bearings. The evidence accordingly is distinct and direct, that the matter was duly brought before Lord *Gifford*, then Master of the Rolls, who made the order in question. The indorsement signed by Mr. *Shadwell* on his brief, which is produced, is this: "Ordered, upon stating the point to his Lordship, Aug. 11, 1824." This is evidence that the point was stated. What point? The point of bringing some land within the parliamentary restriction. And this is made still clearer by the indorsement signed on the same day by Mr. *Tinney*, who held the brief for the Respondents, which refers to the following memorandum within his brief, and which he also signed, and which is in these words: [His Lordship read the memorandum.] Nothing can be more clear or more distinct than this: it contains the whole question. Lord *Gifford*, therefore, after hearing and considering this, thought fit to make the order directing the Master to inquire whether it was proper that the contract should be carried into effect.

The first question, therefore, is, in my opinion, disposed of. There was no suppression, no concealment, no fraud practised upon the Court, which would of itself vitiate the whole transaction. The point was fairly stated to the Court and considered.

The next question to be considered is this: Is the order manifestly wrong? Is it such an order as this Court clearly could not with propriety make? The objection now made to it is that stated by Mr. *Shadwell:* that it might create a perpetuity in lands exceeding in value those within the provision of the Act of 43 Geo. 3. In the first place, it is to be observed that the restraint upon alienation enacted by the statute of 6 Geo. 1 was not a complete restraint; it only affected persons of the Roman Catholic persuasion. It might well be thought that the scope and object of the first Act was to create a great inducement to young men who were likely to become Earls of *Shrewsbury* to become Protestants. If this be so, the addition of property to a value exceeding £80,000 was but increasing the inducement to produce such conversion. The first Act only restrained Roman Catholics. Is there anything in the policy of the law at the time when such a restraint existed —that is, in 1824, prior to the Act for the emancipation of Roman

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Catholics—which forbade a person from adding to the restraint imposed upon persons of that persuasion, or from increasing the inducement to their conversion? I am not able to come to any such conclusion to such an extent as to say that an order of this Court expressly so determining is so palpably wrong that it must afterwards be wholly disregarded, and the consequences of it remedied.

In April, 1827, before the Master had made his report, Earl *Charles* died, having devised all his lands to Earl *John*, who continued and confirmed the transaction. On the 21st of July, 1832, the Master made his report approving of the purchase; and on the 27th of the same month the Court confirmed his report, and referred it to him to approve of a proper conveyance to be executed for the purpose of carrying the contract into effect. Accordingly the Master approved of the conveyance as it now stands, and this was executed on the 2nd of November, 1832. The conveyance, as executed, included, by the use of general words, additional property to the value of about £47,000 or £48,000, besides that included in the original contract: so that, in fact, for the sum of £1000, property to the value of about £137,000 is included in and made subject to the restriction contained in the Act of 6 Geo. 1. It may be said that this additional conveyance of property not included in the original contract was not sanctioned by the Court of Chancery, and that it vitiates the transaction at least to that extent. But it is difficult to see, if the transaction be valid, when land of eighty or ninety times the value is given for £1000, why it should be invalid if the property be worth 140 times the sum given for it. If, indeed, the case had been that this additional conveyance of land was a mistake, and a bill had made out such a case, and sought to correct the settlement, a decree to the extent of restoring these lands might have been made. But this is not so. It is true that the bill prays in the alternative that the deed of conveyance may be rectified by omitting the lands which were not included in the original contract, but it does not attempt to prove, or even allege, that the lands and hereditaments were included by mistake, which would be essential for the purpose of inducing the Court to reform the conveyance itself. On the contrary, it is the case of the bill that Earl *John* was aware of what the conveyance contained; and that

it was part of the scheme, or plan, or whatever else it may be called, to add property to this amount to the lands attached to the Earldom, and which, by the Act of 6 Geo. 1, were made inalienable by a Roman Catholic. I must look at the transaction as I should have done if the rights of the Plaintiffs had arisen, and as if this bill had been filed immediately after the transaction was completed, and as if the land had been so conveyed knowingly and intentionally by a mere stranger who was desirous to add to the importance of the Earldom, and to induce the possessor of it to become a Protestant; and I am unable, so regarding it, to find any principle of English law relating to perpetuities so forcible and so paramount as to say that a decision of the Master of the Rolls, ratifying such a transaction, is so defective that it ought at once to be reversed, and all orders and deeds executed in accordance with it annulled.

But there is another and subsequent fact in the transaction which tells most strongly in favour of the Defendant upon the present occasion, and this fact is the passing of another Act of Parliament in the 6th and 7th of the Queen, and which received her assent on the 22nd of August, 1843, more than ten years after the transaction I have referred to was completed. This Act recited the Act of 6 Geo. 1; it recited the pedigree of the persons to whom the Earldom had descended; it recited that it would be for the benefit of Earl *John* that the hereditaments therein mentioned should be vested in trustees on trust to sell, with a power of investing the proceeds in the purchase of other hereditaments to be settled to the uses and subject to the restriction subsisting in the settled estates not vested by the Act of 43 Geo. 3 in the trustees for sale; and further that it would be for the benefit of the Earl of *Shrewsbury* and those succeeding to the settled estates, if they were authorized to exchange or to sell, and reinvest the proceeds of part of the settled estates for other lands and hereditaments; and that it would be expedient that the proviso permitting persons who had become Protestants to alien the estates should be repealed. The Act then enacted, amongst other things, that the hereditaments in the 2nd schedule should be vested in trustees for sale and reinvestment of the proceeds, and after providing for and regulating the powers of jointuring and raising portions for younger

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children, it repealed the proviso contained in the 6 Geo. 1, which enabled a person who became a Protestant and took the oaths of allegiance and supremacy, and subscribed the declaration of conformity, to alien the settled estates.

The effect of this Act was by this clause (the 32nd), which repealed the proviso above mentioned, wholly to alter the character of the previous enactments. Instead of being an Act which encouraged the possessors to become Protestants, it disregarded that object, repealed it altogether, and made the estates attached to the Earldom wholly inalienable by any one, whether Papist or Protestant. Had the Act passed prior to the contract made for settling the lands, in July, 1824, it might have had a very material influence on the whole transaction, and might have induced the Court to refuse its assent to the proposed purchase and sale; but coming when it does, after these lands and hereditaments had been conveyed to and included in the settlement made by the 6 Geo. 1 and 43 Geo. 3, it has a contrary effect, and though it does not in express terms sanction the sale and purchase made in 1824 and 1832, it does so indirectly; and whatever may be the policy of the law on the subject, it enacts, in effect, that all the lands then in settlement attached to the Earldom of *Shrewsbury* shall be inalienable by any one of the possessors whatever may be his religious opinions. I am now called upon to say that, notwithstanding all this, the disentailing deed executed by Earl *Bertram* of the lands so conveyed was effectual to destroy the entail; that the Act of 6 & 7 Vict. did not affect the hereditaments, and that, in despite of all that has occurred, these lands and hereditaments are, or ought to be, by virtue of his subsequent devise, vested in the Plaintiffs. I am of opinion that I cannot so hold or make any decree that shall have that effect.

The second question, to which I have already referred, is this. Part of the lands included in the conveyance were lands of which Earl *John* was seised in tail male. Earl *John* suffered a recovery of these lands and hereditaments in order to enable him to convey them, but no record of the recovery was ever registered, and no writ of seisin seems to have issued. The question is, whether this invalidates the recovery and the conveyance of the lands. If this had been the only question it might, perhaps, as was suggested,

have been held that it might have been better tried in a Court of law than in a Court of equity. If this had been so, and assuming that in this case the recovery was bad, the tables would have been turned, and the Defendant would have had to apply to this Court to prevent any one who claimed under Earl *John* from contesting the efficacy of the conveyance, and from taking advantage of a technical informality to defeat a valid contract for value duly entered into. And I am of opinion that, if such had been the case, this Court would have granted the relief required. In considering this question, it is necessary to do so on the assumption that the contract entered into by Earl *Charles* with the trustees appointed by the Act of 43 Geo. 3, and afterwards confirmed and carried into execution by Earl *John*, was a valid and proper contract; and, so treating it, I apprehend that this Court would not allow any person who claimed through Earl *John* to upset the contract, either wholly or in part, on the ground of some technical informality which made it ineffectual in law. If this was a proper contract entered into for value, then it might have been specifically enforced against Earl *John*, and if so, he would have been bound to do all such acts as were necessary for the purpose of vesting a good estate in the trustees under the Act of Parliament, who were the purchasers, and I cannot allow a person who is bound by his valid acts to take advantage of this informality for the purpose of defeating the purpose which he and Earl *Charles* had in view, and which the Court of Chancery held to be lawful and proper. This renders it unnecessary for me to go into the question whether the recovery was defective, and, if it were, whether the defect has been cured by the statute of 14 Geo. 2, c. 20.

I am of opinion, therefore, that the case of the Plaintiffs fails on both grounds, and that the bill must be dismissed, and that the costs must follow the event.

Solicitors for the Plaintiffs: Messrs. *Currie & Williams.*

Solicitors for the Defendants: Messrs. *Nicholson & Herbert;* Messrs. *Bray, Warren, Harding, & Warren;* Messrs. *Young & Jackson.*

M. R.
1866
Dec. 15, 18.
1867
Jan. 12, 25.

McCAROGHER *v.* WHIELDON.

Covenant—Legacy of Residue—Double Portions—Satisfaction—Election.

A father, upon the marriage of his son, covenanted, by will, or otherwise in his lifetime, to give or assure one-fifth part of the real and personal estate to which he might be entitled at or immediately before his death (subject to the payment thereout of one-fifth of his debts, funeral and testamentary expenses, and legacies) to trustees upon trust to pay the income to the son until (among other things) some event should occur whereby the income would (if the same were thereby made payable to the son absolutely) become vested in some other person or persons; and then upon trusts for the benefit of the son's wife and the issue of the marriage, with a discretionary trust for the benefit of the son after his wife's death. By his will, the father directed his debts to be paid by his executors, and charged them, as far as the law permitted, on all his real and personal estate; and he gave his real and personal estate to trustees in trust for all and every of his children who should be living at the time of his death. The father died leaving five children:—

Held, that the gift in the will did not operate as a satisfaction of the covenant in the settlement so far as the wife and children of the son were concerned; that the trustees were entitled to one-fifth part of the testator's real and personal estate, after payment of his debts, legacies, and funeral and testamentary expenses; that the gift in the will did operate as a satisfaction of all the interest of the son under the settlement; and that the son must, therefore, elect between his life interest under the settlement and one-fifth of the residue which would remain after satisfaction of the covenant.

The son electing to take under the will:—

Held, that such election determined his life interest under the settlement, and that the income became payable to his wife.

By an indenture dated the 10th of October, 1848, being the settlement made in contemplation of the marriage shortly afterwards solemnized between *Harry Thomas Turner Whieldon* (the son of *George Whieldon*) and *Frances Jane McCarogher*, *George Whieldon* covenanted with the trustees of the settlement that he would every year after the solemnization of the marriage, and during his life, pay to the trustees a sum of £100, in manner therein mentioned; and would also, in and by his last will and testament, or otherwise in his lifetime, and at his own proper costs and charges, well and effectually give and bequeath, or convey and assign, and surrender, or otherwise settle and assure, one full equal fifth part or share of and in all such real and personal estate and

effects whatsoever and wheresoever as he at or immediately before the time of his death should or might be in anywise beneficially seised or possessed of, or entitled to, subject nevertheless to the payment and satisfaction thereout of one full equal fifth part or share of all his just debts and funeral and testamentary expenses, and also of such jointure as he might by his will provide for his widow during her life, and also of such legacies (but in case of legacies to his children, not exceeding £1000 to any one child) as he might thereby give, so that the same should upon his death be effectually vested in the trustees for the time being of the settlement upon the trusts thereby declared, being trusts for the investment thereof, and for the payment of the income of such investments to *Harry T. T. Whieldon* until (amongst other things) he should do or commit or omit some act, or some event should occur whereby or whereupon such income, or some part thereof, would (if the same were thereby made payable to him absolutely, and without restriction) become vested in some other person or persons; and in such case the trustees were to hold the investments upon trust during the remainder of the joint lives of *Harry T. T. Whieldon* and *Frances Jane*, his wife, to pay the income to *Frances Jane*, his wife, for her separate use, without power of anticipation; and in case she should survive her husband, then to pay the same to her for her life; but if the husband should be the survivor, then upon trust to pay and apply the income, at their discretion, for the benefit of *Harry T. T. Whieldon*, and the persons who, if he were dead, would, under the trusts thereinafter contained, be entitled thereto, or all or any (exclusively of the other or others) of them exclusively of *Harry T. T. Whieldon*, and, from and after his death, as to the capital of the trust fund, upon certain trusts for the children of the marriage, and their issue, and in default for the next of kin of *Harry T. T. Whieldon*.

The father of *Frances Jane Whieldon* thereby also covenanted to pay an annual sum of £100 to the trustees, and to give and bequeath a moiety of his residuary estate to them, to be held upon certain trusts thereby declared. The settlement contained a power enabling the trustees for the time being, at their discretion, to sell any part of the property which might be vested in them in possession.

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George Whieldon, by his will, dated the 9th of March, 1857, directed that all his funeral and testamentary expenses, and also all his just debts, and the legacies thereinafter mentioned, should be paid by his executors thereinafter named; and he thereby charged the same (as far as the law permitted) on all his real and personal estate; and, after bequeathing certain legacies, as to all his real estate, and all the rest and residue of his personal estate whatsoever, he gave and bequeathed the same and every part thereof respectively, subject to, and charged and chargeable with, the payment of all his just debts, legacies, funeral and testamentary expenses, unto and to the use of his said executors, their heirs, executors, administrators, and assigns, upon the trusts thereinafter mentioned—namely, upon trust to collect and receive the dividends, interest, rents, issues, and profits of all his real and personal estate, and from time to time to lay out and invest the same, after payment of all his just debts and legacies, and such expenses as aforesaid, in manner therein mentioned. And he directed that the trustees should stand and be seised and possessed of all his real and personal estate in trust for all and every of his children who should be living at the time of his decease, their heirs, executors, and administrators, according to the nature of each property, in equal shares as tenants in common, and not as joint tenants; and that the trustees should convey and assure, or assign, divide, or pay to each and every one of his said children, their heirs, executors, or administrators, in equal proportions, the share of all his real and personal estate to which he or she would become entitled as aforesaid under or by virtue of his will, or permit the same to remain invested and undivided, as aforesaid, at the option of each and every one of his said children, and as might be thought best calculated to promote their interests in the said property. And he strongly recommended his children, and each and every one of them, to work certain mines of coal and ironstone, and to employ certain persons therein named in the management thereof. The will contained a power of sale by the trustees, with the consent of the children.

George Whieldon died in September, 1858, leaving no widow, but five children (one of whom was *Harry T. T. Whieldon*) him surviving. A suit was shortly afterwards instituted by the trustees of

the marriage settlement of *Harry T. T. Whieldon*, for the purpose of having their rights and interests in the real and personal estate of *George Whieldon* ascertained and declared, and now came on to be heard on further consideration.

Mr. *Baggallay*, Q.C., and Mr. *Woodroffe*, for the Plaintiffs, and also for *Frances Jane*, the wife of *Harry T. T. Whieldon*, submitted that the trustees were clearly entitled to one-fifth of the real and personal estate of the testator, and that they were not interested in any dispute which might arise between *Harry T. T. Whieldon* and his brothers and sisters.

Mr. *Kenyon*, Q.C., and Mr. *Herbert Smith*, and Mr. *Selwyn*, Q.C., and Mr. *Gill*, for the brothers and sisters of *Harry T. T. Whieldon*, contended that this was a case which fell within the rule against double portions, and that the circumstance that the gifts by the settlement and by the will were directed to be enjoyed in different ways, did not take the case out of the rule: *Coventry* v. *Chichester* (1); *Kirk* v. *Eddowes* (2); *Earl Durham* v. *Wharton* (3); *Campbell* v. *Campbell* (4); *Lady Thynne* v. *Earl of Glengall* (5); *Trimmer* v. *Bayne* (6); *Montefiore* v. *Guedalla* (7); *Bruen* v. *Bruen* (8); *Copley* v. *Copley* (9); *Hinchcliffe* v. *Hinchcliffe* (10); *Lethbridge* v. *Thurlow* (11); *Bellasis* v. *Uthwatt* (12).

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for *Harry T. T. Whieldon* :—

It has never yet been decided that an absolute gift by will to a child is a satisfaction of a portion previously agreed to be settled on him and his wife and children. In *Campbell* v. *Campbell* an absolute gift by will was held to be in satisfaction of an absolute interest previously created by settlement. In *Coventry* v. *Chichester* a life interest was given to the child, both by the will and by the settlement.

In the present case the gift by the will is to the children of the

(1) 2 H. & M. 149; 2 D. J. & S. 336.
(2) 3 Hare, 509.
(3) 3 Cl. & F. 146.
(4) Law Rep. 1 Eq. 383.
(5) 2 H. L. C. 131.
(6) 7 Ves. 508.
(7) 1 D. F. & J. 93.
(8) 2 Vern. 438.
(9) 1 P. Wms. 146.
(10) 3 Ves. 516.
(11) 15 Beav. 334.
(12) 1 Atk. 426.

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testator living at his death. Therefore, if *Harry T. T. Whieldon* had not survived the testator, he would have taken nothing, but if he does survive, there is a clear indication of intention that he should take. Again, the will contains a direction to pay the testator's debts: one of these was the liability on the covenant in the marriage settlement, and that the testator meant to be satisfied before the residue was divided: *Pinchin* v. *Simms* (1). The word debts in the settlement means debts other than that thereby created: *Charlton* v. *West* (2).

It has always been laid down, that *slight* differences in the mode of settling a portion will not take the case out of the rule; and that was insisted on by Lord Justice *Turner*, who dissented from the decision in *Coventry* v. *Chichester* (3). Here the difference is as great as it well could be.

Again, if this gift in the will is to be taken as a satisfaction of the covenant, how can *Harry T. T. Whieldon* exercise the option given to him with respect to allowing his share to remain undivided? or how can he authorize the mines to be worked as recommended by the testator?

Mr. *Leeson*, for the infant children of *Harry T. T. Whieldon*.

1867 Jan. 12. Lord Romilly, M.R.:—

The question raised in this suit is, whether a covenant entered into by the testator, on the marriage of his son, is satisfied, either wholly or in part, by a bequest under his will to that son. [His Lordship then stated the settlement and the will, and continued:—]

The question is, whether the one-fifth so devised and bequeathed to *Harry T. T. Whieldon*, satisfies the covenant contained in the marriage settlement.

It is quite clear, in the first instance, that this bequest in the will is no direct benefit to Mrs. *Whieldon*, the wife of the son, or to the children of the marriage. Can it, then, be any satisfaction of the covenant to the trustees of the settlement, so far as the wife and children are concerned? Upon the faith of this provision for

(1) 30 Beav. 119. (2) Ibid. 124.
(3) 2 H. & M. 149, affirmed, 2 D. J. & S. 336.

them, the lady contracted marriage with her husband Mr. *Whieldon;* on the faith of this provision, her father entered into a covenant to pay £100 per annum, and to give half of his residuary estate to the trustees, to be held by them upon the trusts of the settlement. It is clear, therefore, that this covenant must be performed, and that the one-fifth of the testator's personal estate at the time of his death is a debt to be paid in the first instance, before the estate of the testator can be made subject to the disposition contained in the will.

The counsel for the other children contend that this question is, in reality, decided by the cases which have been cited to me, and particularly by the case of *Coventry* v. *Chichester* (1). I am not sure, however, that that case does not go further than, as it appears to me, I can properly go on the present occasion. The residue is not ascertained until the debts are paid, which the testator expressly desires to be paid in the first instance. One of the specialty debts is the satisfaction of this covenant, which it is clear that the testator could not avoid performing. The proposition which I am asked to sustain on the authority of that case is, that I must make the son, *Harry T. T. Whieldon,* satisfy this covenant out of his share of the residue; in other words, that I must introduce into the will of the testator a condition upon the gift of the residue to the son which is not to be found in it, viz., that he shall take one-fifth of the residue, upon condition that he pay a specialty debt of the testator.

There are, in fact, two residues to be ascertained here, as I view the case, one including the amount due on the covenant, and the other excluding it. The first residue is ascertained by deducting all the general and ordinary debts, funeral and testamentary expenses, and the legacies (if any) particularly authorized by the settlement of October, 1848. When this is done, one-fifth of what remains is to be applied in satisfying the covenant contained in the settlement of October, 1848; and when this is done, the second residue is ascertained, and one-fifth of what remains is given to *Harry T. T. Whieldon,* or rather the remaining four-fifths are to be divided equally amongst the children who happen to survive the testator, the result of which is, that one-fifth of these four-fifths

(1) 2 H. & M. 149, affirmed, 2 D. J. & S. 336.

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is given to *Harry T. T. Whieldon*, and, as it appears to me, the only way in which the question can arise is, whether this one-fifth of the four-fifths remaining can be taken by him in addition to the life estate in the one-fifth, which obviously must be paid to the trustees. I know of no case which has gone to this length, that a bequest to a son has been held to be a satisfaction of a debt due from a testator to a son of that son; that would, in my opinion, be extending the doctrine of satisfaction much further than it has hitherto been carried, and, indeed, be out of the principle altogether. I must look at this covenant according to its real meaning, leaving out of consideration all technicalities. If I regarded technicalities, the bequest is no satisfaction at all, for the covenant is with four persons, who are all strangers to the testator, and the bequest is to his son. But omitting this technicality, and looking at the substance of the covenant and the bequest, and observing who are the persons really interested in the performance of the covenant, I find them to be three: 1st, the husband; 2nd, the wife; 3rd, the class composed of the children of the marriage.

Suppose the husband excluded, and that the covenant had been exclusively for the separate use of the wife, without power of anticipation during her coverture, but with power to dispose of it as she pleased after his decease, it is obvious, in that case, that no legacy to the son could be a satisfaction of this covenant. Go a step further: suppose the covenant to be for the wife for life, for her separate use, without power of anticipation, and after her decease for her children. It is, I think, equally obvious that no bequest to the son could be a satisfaction of this covenant. Can it, as regards the wife and the children, make any difference that, under the covenant, another person, who is the husband of the wife and the father of the children, takes an interest separate and distinct from theirs? I think it impossible so to hold. This, then, if I am right in this view of the case, reduces the matter to a comparatively narrow limit, which is this, whether *Harry T. T. Whieldon* can take both one-fifth of the residue after the covenant is satisfied, and also the life interest in the one-fifth of the testator's residue, which is to be paid to the trustees of the settlement; and I am of opinion he cannot, and that the bequest must be considered to be a satisfaction of all the interest which the son takes under his

father's covenant. In order to consider this question, I separate the interests under the covenant as before. Suppose the testator, on his son's marriage, had covenanted to pay him £100 per annum until the testator's death, and afterwards, during the son's life, the interest of one-fifth part of the residue of the testator's estate, and had afterwards bequeathed one-fifth of the residue absolutely to the son, then, I apprehend it to be decided by the authorities that this bequest would be a satisfaction of the covenant. *Campbell* v. *Campbell* (1), and other cases, appear to me to establish this. Is it less a case of satisfaction because the covenant includes other persons who are interested in the matter? Clearly not, if they are strangers. Then does the fact, that the wife and children of the son are the other persons interested, make any substantial difference? I am of opinion that it does not, and that the bequest to a son, if a capital amount, may operate as a satisfaction of a covenant to pay him a life annuity. This, therefore, in my opinion, raises a case of election in the son, *Harry T. T. Whieldon*, and he must elect either to abandon the bequest of one-fifth of the remaining four-fifths of the residue of his father's estate, or he must authorize the trustees of his marriage settlement to pay over his life interest in that one-fifth of the residue which is to be paid to the trustees, to the other four children of his father, to be equally divided between them.

Mr. *Jessel*:—Mr. *Harry T. T. Whieldon* elects to take under the will.

Mr. *Baggallay*:—Then, on behalf of Mrs. *Whieldon*, I submit that his life interest under the settlement has determined.

Lord Romilly, M.R:—That is a point which was not mentioned to me before, and I do not wish to decide it off hand. You may have the cause put in the paper to be spoken to on the Minutes; and you may argue the point then.

Jan. 25. The cause being put in the paper this day, the question of the determination of the life interest was mentioned.

(1) Law Rep. 1 Eq. 383.

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Lord Romilly, M.R.:—I have considered the point since the former occasion, and it appears to me, that the election to take under the will is an event which determines the life interest under the settlement, and the income must be paid to Mrs. *Whieldon.*

Solicitors for the Plaintiffs: Messrs. *Robinson & Preston,* agents for Messrs. *Johnson & Raper, Chichester.*

Solicitors for the Defendants: Messrs. *Rickards & Walker;* Mr. *Rooper;* Messrs. *Wing & Ducane.*

M. R. 1866 Dec. 19.

BOX *v.* BARRETT.

Will—Erroneous Recital—Devise under Mistake—Election.

Under a settlement, the *four* daughters of a testator took equal shares, subject to his life interest. The testator, by his will, recited that under the settlement, his *two* daughters, *A.* and *B.*, would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done; he then devised to *A.* and *B.* certain estates, and to his two other daughters, *C.* and *D.*, other estates, of much greater value. The will did not purport to affect the settled property:—

Held, that as the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, *C.* and *D.* were not put to their election.

Under the settlement on the marriage of *John Box,* the testator in the cause, certain real estate stood limited to the testator for life, and after his decease (in the events that happened) to all the daughters of the testator *equally.*

The testator was at the date of his will, and at the time of his death, tenant for life of the settled estates, and also seised in fee of other real estate. He had *four* daughters, who all survived him.

In 1865 the testator made his will, which contained the following recital:—

"Whereas, under the settlement made upon my marriage, *my two daughters, Ellen and Emily, will become entitled to certain hereditaments:* now, in making this my will, I have taken the same into consideration, and have not devised unto them so large a

share under this my will as I should have done had they not been so entitled as aforesaid."

The testator then devised to his two daughters, *Ellen* and *Emily*, certain estates, and to his other daughters, *Edith* and *Eliza*, certain other estates, of much larger value. The will did not purport to dispose of or affect the settled estates.

The suit, which was a friendly one, was instituted by the testator's daughters, *Edith* and *Eliza Box*, as Plaintiffs, against the two other daughters, *Ellen Barrett* and *Emily Burton*, and their respective husbands, as Defendants.

The Defendants alleged that the devise to the Plaintiffs was made by the testator under the erroneous belief that the Defendants were entitled alone under the settlement, to the exclusion of the Plaintiffs, and that the Plaintiffs were bound to elect whether they would take the exclusive benefit given to them by the will on condition of waiving their interest under the settlement.

The Plaintiffs submitted that they were not bound so to elect, but were entitled to retain their benefits under the will.

The bill prayed a declaration of the rights of the Plaintiffs, and the other parties beneficially entitled under the will.

Mr. *Baggallay*, Q.C., and Mr. *Archer Shee*, for the Plaintiffs:—

This is a case in which the doctrine of election is wholly excluded, both on principle and authority. The testator, being under a misapprehension as to the effect of the settlement, made a distribution of his property on that footing; but although this may be unfair, and might properly influence the feelings of the parties interested, if they were *sui juris*, this Court does not sit to enforce duties of imperfect obligation. The doctrine of election can only apply when it arises within the document which raises the case, as where a will contains a gift of property not within the testator's disposing power. In *Gibson* v. *Gibson* (1), where the question was whether a testator's widow was put to her election with respect to dower, Vice-Chancellor *Kindersley* observed (2): "The doctrine of election, as applicable equally to all cases, is this: that a person who is entitled to any benefit under a will or

(1) 1 Drew. 42. (2) Ibid. 51.

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other instrument, must, if he claims that benefit, abandon every right or interest the assertion of which would defeat, even partially, any of the provisions of the will or instrument." His Honour added, as a further proposition, "that in no case is a person to be put to his election, unless it is clear that the provisions of the instrument under which he is entitled to a benefit would be in some degree defeated by the assertion of his other right." Applying that principle to the present case, there is no gift or provision in the will which is affected by the gift to the Plaintiffs; the testator does not affect to deal with property which he claims as his own, but which is not his own: there is only a mistake as to the effect of the settlement, which influences his gift by the will. In *Langslow* v. *Langslow* (1), the non-execution of a power by a testator under an erroneous impression, stated in his will, was held not to raise a case of election.

In order that a mistake in an instrument should have that effect, the element of fraud must be imported into the case. In *Kennell* v. *Abbott* (2), where a legacy had been given by a woman to a man who passed as her husband, but who, as was afterwards found, had another wife living at the time of the marriage ceremony, the following passage was cited from the Digest (3): "*Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.*" Here it is not pretended that there was any fraud, only a misapprehension.

In *Stephens* v. *Stephens* (4), the principle of election is thus stated:—"If a person has an interest in certain property, and a testator has disposed of that property, which he had no right to do, and gives benefits by his will to the same person, that person cannot take the property which the testator had no right to dispose of, and so defeat the testator's intentions as to that property, without giving up the benefits given him by the will."

In *Dashwood* v. *Peyton* (5), where it was held that there could be no devise by implication from the mere recital of an erroneous conception of right, *Lord Eldon* observed (6): "The real question

(1) 21 Beav. 552. 2 Jur. (N.S.) 1057.
(2) 4 Ves. 802, 808.
(3) Book xxxv. tit. 1, l. 72, s. 6.
(4) 3 Drew. 697, 701.
(5) 18 Ves. 27.
(6) Ibid. 41.

is, whether this is to be considered as a case of election; and though it cannot be a direct devise, as the testator had nothing to give, it is clear that an effectual gift may be made by raising a case of election; but for that purpose a clear intention to give that which is not his property is always required."

Mr. *Southgate*, Q.C., and Mr. *Swanston*, for the Defendants:—

The Plaintiffs in this case must be put to their election. We admit the principle of *Dashwood* v. *Peyton* (1), but deny its application to the present case, where there is more than the mere recital of an erroneous impression. In that case, although Lord *Eldon* made the observations that have been cited, it appears from the close of the judgment (2) that the order refusing the injunction prayed for was made "without prejudice to any question upon the case of election." *Langslow* v. *Langslow* (3) is distinguishable. There the testator, who was donee of a power of appointment to *A.* and *B.*, had, by deed, exercised the power in favour of *A.*, and then, by his will, recited that *A.* could, under the hotchpot clause, be obliged to bring in the appointed part, and added that, as he could make no further appointment, the whole settled fund must be divided equally between *A.* and *B.* It turned out that the hotchpot clause did not apply, and it was held that no case of election arose. But there the property was all subject to the power of appointment, and it was held that there was no appointment made by the will. In the judgment, your Lordship referred to *Blacket* v. *Lamb* (4), where a testator duly appointed a fund in favour of objects of the power absolutely, and also bequeathed to them his own property, especially requesting them to leave the appointed fund to persons not objects of the power; and it was held that no case of election was raised, but that the result would have been different if there had been a direct appointment of the subject of the gift to strangers. These cases have no application to the present case, where the intentions of the testator, that his children should share equally, cannot be carried into effect if the Plaintiffs' contention should prevail. In *Jarman* on

(1) 18 Ves. 27.
(2) Ibid. 49.
(3) 21 Beav. 552: 2 Jur. N.S. 1057
(4) 14 Beav. 482.

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Wills (1), the principle of the cases on gift by implication is thus stated: "A recital of a person's supposed right, independently of the will (without any expression except such as can be gathered from such recital of an intention to benefit him), will not confer on him those rights. But the result is different where the circumstances are such as to shew that the testator has parcelled out his gifts on the faith of the correctness of the recital." *Westcott* v. *Culliford* (2) illustrates this proposition. Where there is a gift by implication of property which belongs to another person, to whom another benefit is given under the will, then a case of election arises.

Dashwood v. *Peylon* (3) was a case of precatory trust, which was held to amount to nothing. In *Sanford* v. *Raikes* (4), where a testator had contracted to purchase a house, which he afterwards gave by will to his executor, adding that it was to be paid for out of timber which he had ordered to be cut down, this was held to amount to a direction that the purchase-money of his house should be so provided for. In *Poulson* v. *Wellington* (5), where a woman executed a deed in anticipation of marriage, to which her intended husband was a party, reciting that if she should make no appointment within six months of a certain share of property, it would belong to her intended husband, and she died without disposing of it, the recital was held to amount to a gift to the husband. In the present case the gift to the Plaintiffs was only made on the footing that they were not entitled under the settlement. This is found not to be the case, therefore they cannot take the gift under the will without being put to their election.

Lord Romilly, M.R.:—

I am of opinion that no case of election arises here. There must be some disposition of property which the testator had no right to dispose of to make it one. I assent to the observations that have been cited to me from the judgments in the cases of *Langslow* v. *Langslow* (6) and *Blacket* v. *Lamb* (7); which cases

(1) 3rd ed. vol. i. p. 492.
(2) 3 Hare, 265.
(3) 18 Ves. 27.
(4) 1 Mer. 646.
(5) 2 P. Wms. 533.
(6) 21 Beav. 552. 2 Jur. N.S. 165.
(7) 14 Beav. 482.

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were decided by myself. In the present case there is nothing more than a recital of an intention under a belief which was erroneous, and thereupon the testator gives certain property in a particular way.

If I were to hold that a case for election arises here, the most serious and yet strange results would follow: for, suppose a man recited in his will that his nephew would have a large fortune from his father, and that, therefore, he left all his property to his other nephew, and that recital turned out to be incorrect, would any question of election arise upon that, because the supposed intention of the testator was that the property should be divided equally? The most that can be said of the recital in the case before me now is, that it is an erroneous one; but, because the testator has made a mistake, you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition.

The will in this case must be taken as it stands. The result is that no question of election arises. There will be a declaration to that effect.

Solicitors: Messrs. *Graham & Lyde.*

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M. R.
1866
Dec. 7, 8, 19.

Trade Fixtures—Mortgage—Partnership.

Trade fixtures affixed to mortgaged freehold premises, after the mortgage, by the mortgagor and his partner, occupying the premises for the purpose of their trade, pass to the mortgagee.

Ex parte Cotton (1) followed.

BY an indenture dated the 1st of May, 1865, a freehold dwelling-house and warehouse belonging to *Daniel Ward* were mortgaged by him to *Samuel Shakspear*, in fee simple, to secure £1200 and interest, and by an indenture dated the 27th of March, 1866, the same property was mortgaged to the Plaintiff, *William Cullwick*, in

(1) 2 M. D. & D. 725.

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fee simple, to secure £450 and interest. In November, 1866, *Shakspear's* mortgage was transferred to the Plaintiff.

Ward was an iron merchant, and nail and chain manufacturer, in partnership with *George Hartshorne*, under the firm of *Hartshorne & Ward*, and in April, 1866, *Hartshorne & Ward* put up in the warehouse comprised in the mortgages certain machinery, with the intention of using the warehouse for the purposes of their trade, as an engineer's fitting shop.

On the 26th of May, 1866, *Hartshorne & Ward* executed a deed under the *Bankruptcy Act*, 1861, by which they conveyed all their property to the Defendants, as trustees for the benefit of their joint and separate creditors.

The Defendants having advertised the sale by auction of the stock in trade and effects of *Hartshorne & Ward*, including the machinery set up in the warehouse, to take place on the 27th of August, 1866, the Plaintiff, on the 24th of August, filed the bill in this suit, for an injunction to restrain them from selling the machinery, on the ground that being fixed to the building it formed part of the mortgage security, but no injunction was obtained, and the sale took place. The Plaintiff then amended his bill, by praying for an account and payment to him, in part discharge of his mortgage debt, of the money received by the Defendants for the sale of the machinery, and for an injunction to restrain the Defendants from paying the money to any other person.

The Plaintiff gave notice of a motion for an injunction, and the motion was treated by consent as a motion for decree.

It was admitted that some part of the machinery in question was fixed to the building by screws or bolts, but as to the other part there was a considerable conflict of evidence on the question, whether it was fixed or loose. The whole had been removed soon after the sale, without injury to the building, according to the evidence on behalf of the Defendants, but some of the Plaintiff's witnesses alleged that the building had been seriously injured by the removal. The machinery which was admitted to have been fixed could not have been used without being fixed.

Mr. *De Gex*, Q.C., and Mr. *Nugent*, for the Plaintiff:—

Trade fixtures annexed to the freehold after the mortgage belong

to the mortgagee, whether they are annexed by the mortgagor: *Walmsley* v. *Milne* (1), or by a firm in which the mortgagor is a partner, using the mortgaged property for the purpose of their trade: *Ex parte Cotton* (2). The distinction between trade fixtures and other fixtures applies only as between landlord and tenant, not between mortgagee and mortgagor. *Mather* v. *Fraser* (3) is a distinct authority that chattels annexed by screws and bolts, as in the present case, are fixtures, which will pass under a mortgage of the land. [They also referred to *Amos & Ferard* on Fixtures (4); *Hitchman* v. *Walton* (5).]

Mr. *Selwyn*, Q.C., and Mr. *Wickens*, for the Defendants:—

The contention of the Plaintiff comes to this, that a tenant of mortgaged property is not entitled to remove trade fixtures. Such a doctrine has never been laid down, and would be most injurious to trade. No manufacturer would be safe in taking a lease of property upon which there was a mortgage. In this case the partnership were in the position of tenants, and it makes no difference that one partner happened to be the mortgagor. Could it be said, that if a shareholder in a company, or the member of a corporation, lets property, which he has mortgaged, to the company or the corporation, and they put up trade fixtures, the fixtures belong to the mortgagee? The articles in question were not fixtures according to the test laid down in *Hellawell* v. *Eastwood* (6); they have been removed without injury to the building or to themselves, and they were put up not for the permanent improvement of the building, but for the more convenient use of the chattels themselves. In *Trappes* v. *Harter* (7) it was held that machinery fixed to the freehold did not pass by the mortgage, and that case has been approved of in *Ex parte Barclay* (8); and the same proposition was laid down in *Waterfall* v. *Penistone* (9). In *Walmsley* v. *Milne* the Court held that the fixtures were annexed for the better enjoyment of the estate. In *Ex parte Cotton*, the question was virtually left undecided, an inquiry having been directed

(1) 7 C. B. (N. S.) 115.
(2) 2 M. D. & D. 725.
(3) 2 K. & J. 536; 2 Jur. (N. S.) 900.
(4) Pages 224—229, 2nd ed.
(5) 4 M. & W. 409.
(6) 6 Ex. 295.
(7) 2 C. & M. 153.
(8) 5 D. M. & G. 403.
(9) 6 E. & B. 876.

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which of the articles were fixtures; and it is not probable that the Court of Review intended to overrule *Trappes* v. *Harter* (1), which does not appear to have been cited. In *Mather* v. *Fraser* (2), the mortgage expressly comprised machinery, then or thereafter to be fixed to the land. [They also cited *Elwes* v. *Maw* (3); *Hutchinson* v. *Kay* (4).]

Mr. *De Gex*, in reply:—

This is not a case of landlord and tenant. A mortgagor, who is a mere tenant by sufferance, cannot give to a third party that which he does not himself possess, namely the right to remove fixtures as against the mortgagee. The lessee of a mortgagor must take the consequences of having taken a lease from the person who is not the legal owner. But here the partners were not even lessees of the mortgagor, and if there had been no mortgage, the fixtures could not have been removed, though probably the partnership would have been entitled to compensation from the partner who owned the land, for their outlay in the improvement of it. The present case is completely covered by the authority of *Ex parte Cotton* (5), which has never been overruled or doubted. The decision in *Trappes* v. *Harter* turned on the construction of the deed, and the particular circumstances of the case.

Dec. 19. LORD ROMILLY, M.R.:—

In this case two questions arise—one a question of law, and the other a question of fact. The first is, whether the machinery which has been fixed to the premises since the date of the mortgage deed, and which consists solely of trade fixtures put up for the purpose of enabling the partners to carry on business, passes to the mortgagee, by virtue of his mortgage, as attached to the freehold; and the second is, whether some of the machinery was in reality loose, or whether it was affixed to the freehold.

As to the first question, after reading and considering all the

(1) 2 C. & M. 153.
(2) 2 K. & J. 536. 3 Jur. N.S. 900
(3) 3 East, 38.
(4) 23 Beav. 413. 3 Jur. N.S. 1052
(5) 2 M. D. & D. 725.

cases cited, I am unable to distinguish this case from the case of *Ex parte Cotton* (1). There a trader mortgaged the trade premises in fee, and then he entered into partnership, and the firm carried on business on the same premises, and, after the mortgage, they erected trade fixtures and then became bankrupt, and it was held that these trade fixtures belonged to the mortgagee and not to the assignees. Now that is precisely this case. But it remains to be considered whether that is the law on the subject; and, as opposed to that, the case of *Trappes* v. *Harter* (2) was cited, which was a very careful decision, and elaborately considered by the Court of Exchequer, and unquestionably it seems at first difficult to reconcile *Trappes* v. *Harter* with the case of *Ex parte Cotton*. It is to be observed that *Trappes* v. *Harter* was the earlier case, and was not cited in *Ex parte Cotton*. In *Trappes* v. *Harter* certain persons carried on business as calico printers, and the premises on which their works were carried on were conveyed to one of the partners in fee. Various buildings and machinery were afterwards erected from time to time by the firm for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to the one partner, but could be removed without material injury to the buildings. In the different stock-takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures; and it also appeared that in the country where the premises were situated, machinery of this description was, according to the custom, sold distinctly from the freehold. The freehold was subsequently conveyed to two partners, and they, in 1828, mortgaged them to the wife of the Plaintiff under the description of "all the messuages, dwelling-houses, lands, and buildings therein mentioned, and also all that and those the steam engine, mill gearing, heavy gear to mill-wright work, fixed machinery, and other matters and things then standing and being in and upon the thereby demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold." All the machinery and fixtures appear to have been in the reputed ownership of the partners, who carried on business until 1831, when they became bankrupt,

(1) 2 M. D. & D. 725. (2) 2 C. & M. 153.

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and the Defendants were appointed their assignees. The Plaintiff had inspected statements of the affairs of the partners which treated the machinery as not included in the mortgage, and he made no objection to these statements. In April, 1831, the assignees sold all the machinery, and the greater part was removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such manner, however, that they might easily be removed. In that state of things Lord *Lyndhurst* gave a long and careful judgment, in which he held that the machinery did not pass to the inheritance, but was part of the personal estate of the bankrupts; that it passed to the assignees, and that it was not intended to pass, and did not, in fact pass, to the mortgagee under the mortgage deed.

At first sight it seems rather difficult to reconcile the two cases; and this case was very strongly relied upon by the Defendants, and also the case of *Waterfall* v. *Penistone* (1). There a person of the name of *Jenkinson* mortgaged to a person of the name of *Marsh* the freehold of a mill with machinery thereon, and afterwards *Jenkinson* assigned to *Penistone* the equity of redemption and certain machinery which had been fixed in the mill since the first mortgage. Afterwards, in consideration of £500 paid to *Jenkinson* by *Penistone*, *Jenkinson* assigned to *Penistone* the machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the £500; and by the same indenture, *Jenkinson* covenanted that the mill and machinery specified in the previous conveyance of the equity of redemption should be charged with the £500. The machinery comprised in this indenture was erected for the purpose of carrying on the manufactory in the mill, and for the more conveniently so doing, a part of it was screwed, nailed, and otherwise fixed to the mill. *Jenkinson* became bankrupt, in anticipation of which *Penistone* took possession and entered on the mill and machinery, *Jenkinson* having been in possession for more than twenty-one days after the making of the indenture up to the time of the entry. The machinery comprised in the last mentioned indenture still remaining on the premises, *Jenkinson's* assignees claimed it on the ground that such indenture had not been registered under the 17 & 18 Vict. c. 36. It was

(1) 6 E. & B. 876.

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held that they were entitled to the machinery, the conveyance thereof being void as against them for want of registration; for that under the interpretation clause the machinery was personal chattels, as the intention of the parties appeared to be that the machinery should pass separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption.

That case is very distinguishable from *Ex parte Cotton* (1), because it turns very much upon the fact of the indenture not having been registered. But all this is gone into, and very clearly pointed out, in an elaborate judgment by Mr. Justice *Crowder* in the case of *Walmsley* v. *Milne* (2), and in the course of the argument in that case Mr. Justice *Williams* expressed his opinion that, so far as regards the right to the fixtures having been decided to pass to the assignee in preference to the mortgagee, the case of *Trappes* v. *Harter* (3) had been overruled; and Mr. Justice *Crowder* suggests that *Trappes* v. *Harter* must be considered to have been determined on the peculiar facts of the case, and not otherwise. Having referred to the whole of the facts, he says:—"*Trappes* v. *Harter* was a decision in favour of the assignees of a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to pass them. The mortgage enumerated various fixtures, but did not refer to the fixtures in dispute; and this omission, together with other circumstances in the case, induced the Court to be of opinion that they were intentionally omitted in the mortgage deed, and therefore did not pass by it. That case then must be regarded as having been decided on its own peculiar circumstances, as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us." Then he also says the same thing of the case of *Waterfall* v. *Penistone* (4), for the reason I have already stated.

The only point on which any substantial argument can be founded in this case is, that the fixtures were put up by the tenants, and not by the mortgagor. But, without going into the question whether the partners were properly tenants in the strict sense of

(1) 2 M. D. & D. 725.
(2) 7 C. B. (N. S.) 115. 6 Jur. N.S. 127
(3) 2 C. & M. 153.
(4) 6 E. & B. 876. 3 Jur. N.S. 15.

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the term, this question is disposed of by the case of *Ex parte Cotton* (1). The other cases cited, which are most of them commented on at length in *Walmsley* v. *Milne* (2), which I have referred to, and the case of *Mather* v. *Fraser* (3), before Vice-Chancellor Sir *William Page Wood*, all concur in this view. I am, therefore, compelled to follow *Ex parte Cotton*, and to hold that the fixtures, although trade fixtures, and put up for the purpose of carrying on the business of the partnership, and, although put up since the date of the mortgage, so far as they are affixed to the freehold go with it to the mortgagee.

[His Lordship then considered the second question, and, after deciding that part of the machinery claimed by the Plaintiff had not been affixed to the freehold, continued :—]

With respect to all the others, I am of opinion that they did pass to the mortgagee, and that the mortgagee is entitled to have an account of the money received for them.

I am of opinion that this is not a case for giving any costs. The Plaintiff is entitled to add his costs to his security, if that is of any use to him, but I cannot make the Defendants pay the costs, as I think they were entitled to have the opinion of the Court on these questions.

Solicitors for the Plaintiff: Messrs. *Skilbeck & Griffith*, agents for Mr. *Tandy, Dudley.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Bernard & King, Stourbridge.*

(1) 2 M. D. & D. 725. (2) 7 C. B. (N. S.) 115. (3) 2 K. & J. 536.

PAINE *v.* HUTCHINSON.

V.-C. S.
1866
Dec. 5.

Contract for Purchase of Shares—Custom of the Stock Exchange—Specific Performance.

The Plaintiffs, dealers in shares, contracted to sell to the agents of the Defendant shares which they had purchased from, and which remained registered in the name of, *C.* On the settling day the agents of the Defendant gave his name, as principal, for insertion in the deeds of transfer. Transfers executed by *C.* to the Defendant were delivered to Defendant's agents, who paid for the shares out of money given to them by the Defendant. The Defendant refused to execute the deeds and to procure their registration, on the grounds that he told his agents that he intended to resell without taking a transfer, and that they had given his name without authority. Five months after the sale, the company was ordered to be wound up, and on bill for specific performance and indemnity (filed before the winding-up), to which *C.* was not a party :—

Held, that Plaintiffs were entitled to a decree for specific performance, and that Defendant should execute transfers, and procure his name to be registered.

THE Plaintiffs were dealers in stocks and shares in the *City*. They had, before the 2nd of November, 1865, purchased 100 shares, of £100 each, in the *Contract Corporation, Limited*, on which calls, amounting to £10 per share in the whole, had been made and paid. These shares were registered in the name of their vendor, *Albert Cruse*. The Plaintiffs, on the 2nd of November, entered into an agreement with *Price & Potts*, sharebrokers, to sell to *Price & Potts* the 100 shares; fifty at a discount of £6 5*s*., and the remaining fifty at a discount of £6 per share.

The purchase-money amounted to £387 10*s*., and was to be paid on the next settling day (15th November). According to the course of business on the *Stock Exchange* it is not usual to require brokers to disclose the names of their principals at the time of sale, but on the next settling day. On the 15th November, *Price & Potts* gave the Plaintiffs a note, with the name of the Defendant, for the purpose of its being inserted in the deeds of transfer. The Plaintiffs delivered to *Price & Potts* transfers from *Albert Cruse* to the Defendant, duly executed by *Cruse*, in which the consideration was recited as paid by the Defendant to *Cruse*. On receiving these transfers, *Price & Potts* paid £387 10*s*. to the Plaintiffs.

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Price & Potts had bought under instructions from *Railton & Sons*, sharebrokers, of *Manchester*, who had given them the name of the Defendant as transferee. *Railton & Sons* had been authorized by the Defendant, in October, 1865, to buy 100 shares in the said company at the price given. The Defendant, by his answer, alleged that he had authorized the purchase, on account of himself and a friend, and had told Messrs. *Railton & Sons* that their intention was to resell, and not to have the shares registered in his, the Defendant's, name. One of the firm of *Railton & Sons* gave evidence that the Defendant named no other person than himself as purchaser, that on the purchase being effected they had informed the Defendant that they had bought the shares for him, and that they, being called upon to give the name of the purchaser, and being unable to arrange to carry over the purchase, as desired by the Defendant, were bound by the practice to give, and did give, the Defendant's name as transferee.

It was also in evidence that the Plaintiffs had offered the shares to *Price & Potts* at 10*s.* per share less than the market price, if they would give a guarantee that the transfer should be executed by the purchaser, but they refused to give such guarantee, and accordingly purchased the shares, in the ordinary course, at the market price of the day. Evidence was also given that the only object in the practice sometimes pursued on the *Stock Exchange*, of seeking a guarantee from the purchasing broker that the transfer should be duly registered, was to ensure such registration on the responsibility of the purchasing broker, which would be enforced by the committee of the *Stock Exchange* in a summary way, without recourse to the ordinary Courts of law, and without being obliged at all to have recourse to the principal.

Price & Potts, on receiving the transfers as before stated, sent them to *Railton & Sons*, who, on the 17th November, 1865, duly forwarded them to the Defendant, and *Railton & Sons* repaid to *Price & Potts* the purchase-money paid by them, having received the amount from the Defendant. On the 18th of November, 1865, the Defendant wrote to *Railton & Sons*, asking for a full explanation in reference to the shares, before he accepted the transfers, and stating that, till he got the information, he would retain the transfers; and subsequently wrote to them stating that he had ordered

them to purchase these shares, but that they were for another party's account, and that he did not intend to have them registered in his name; that he had kept the transfers back until a name for transfer could be given; and that he had paid the money, and of course run all the risk, on account of his friend, but would not have the transfers registered.

The company was ordered, on the 23rd of April, 1866, to be wound up under the direction of this Court.

A further call of £5 per share was made on the 18th of May, 1866. The Defendant in his cross-examination, on the 31st of July, 1866, on his answer, stated that the other person mentioned in his answer as his partner in the speculation, was a Mr. *Gill*, who died about the 17th of July, 1866, and that he had never authorized *Railton & Sons* to give in his name as transferee of these shares, and that as soon as he knew it he protested against it.

The bill (which was filed in January, 1866) prayed specific performance, that the Defendant might be ordered to execute the transfers, and to procure his name to be entered on the register, and for an indemnity against losses which might accrue from the neglect of the Defendant to procure his name to be registered.

Mr. *Bacon*, Q.C., and Mr. *J. Napier Higgins*, for the Plaintiffs, after stating the facts, were stopped by the Court, and

Mr. *Greene*, Q.C., and Mr. *Swanston*, for the Defendant, were called upon:—

The Defendant entered into no contract with the Plaintiffs. There is no vendor before the Court to ask for a decree for the specific performance of anything. If there be any contract at all, it is with *Cruse*, but he is not a party to the suit. To give the name of the transferee, the agents must have his authority, and in this case no authority was given by the Defendant. He never bought these shares as a transferee, and he refused to have a transfer in his name. The Plaintiffs are bound to shew that there was a clear contract, and that no other persons are interested in the subject-matter, otherwise they are not entitled to specific performance. The fact that there was no guarantee is evidence that it was intended by the Defendant that his name

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should not be registered. The Defendant's agents exceeded their authority in giving his name. He is not bound by their acts. This is not a case for specific performance. The company being in liquidation, no alteration in the register will be permitted: *Shepherd's Case* (1). The shareholders who were on the register at the time the order was made for winding up are the persons who will be called upon by the official liquidator for contribution, and *Cruse*, who is not before the Court, is the registered owner of these shares. The Plaintiffs are neither equitable nor legal owners of them.

SIR JOHN STUART, V.C.:—

The contract is in very plain terms. The case set up by the Defendant is not that he made no contract, but that he did not make the sort of contract which is stated in the bill. The Defendant states that he contracted to buy in the hope of being able to sell to somebody else before registration. But the Defendant's agents at *Manchester* have proved their authority to purchase, and also the contract with the Plaintiffs, and they state that, having been called upon to supply the name of a transferee, they gave that of the Defendant, because they did not obtain from him the name of any other person. The contract is clearly a binding one upon the Defendant. It has been contended, however, that the Plaintiffs—even if they did contract to sell and the Defendant to buy—have no interest in this suit, inasmuch as the person to make the transfer is Mr. *Cruse*. Now the transaction, so far as *Cruse* is concerned, is perfectly plain. He is the person who sold to the Plaintiffs, and they contracted to sell what they bought from him to the Defendant. But as there has been no transfer executed from *Cruse* to the Plaintiffs, he is the person to execute the deeds of transfer to the Defendant. The decree will be for specific performance. This suit was instituted in January, 1866, long before the winding-up order was made, and with the winding-up this Court has nothing to do. What effect this decree will have, it is not necessary to consider.

MINUTES:—Declare that the agreement for the purchase of 100 shares in the *Contract Corporation, Limited*, by the Defendant ought to be specifically per-

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(1) Law Rep. 2 Eq. 564; 2 Ch. 16.
12 Jur. N.S. 584, ch. 897

formed and carried into execution, and decree the same accordingly; and order that the Plaintiffs and all proper parties do execute a proper deed of transfer of the said 100 shares to the Defendant, such deed of transfer to be settled by the Judge in case the parties differ about the same; that the Defendant do procure the said 100 shares to be duly registered in his name in the register of members of the *Contract Corporation, Limited*; and that the Defendant do pay the costs of the suit.

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Liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Harrison, Lewis, & Co.*

Solicitors for the Defendant: Messrs. *Reed & Phelps*, agents for Messrs. *Sale, Worthington, Shipman, Seddon, & Sale, Manchester.*

In re WARNER AND POWELL'S ARBITRATION.

V.-C. S. 1866 Dec. 20.

Arbitration—Award—Mistake—Enlargement of Time—Jurisdiction—3 & 4 Will. 4, c. 42, s. 39—Common Law Procedure Act, 1854, *s.* 8.

The arbitrators appointed under a submission (with no power of extending the time for making the award), which was made a rule of this Court, having made their award after the time specified, the Court, under the 3 & 4 Will. 4, c. 42, s. 39, and the *Common Law Procedure Act*, 1854, s. 8, enlarged the time and remitted the matter back to the arbitrators.

THIS was a motion, under the 3 & 4 Will. 4, c. 42, and the *Common Law Procedure Act*, 1854, to enlarge the time for making an award, specified in a certain deed of submission, dated the 24th of June, 1861, and to remit the matter back to the arbitrators.

Prior to the date of the deed, disputes having arisen between *Robert Warner* and *Mary Powell*, landowners, as to the liability of *Mary Powell* to repair a sea road and wall in the parish of *Walton-on-the-Naze*, in 1860 *Warner* brought an action against *Mary Powell* to enforce his claim, but while the action was pending, the parties came to an arrangement, and executed the deed of the 24th of June, 1861. The first clause of the deed provided, that if any doubt, difference, or dispute, should arise between *Warner* and *Powell*, touching the construction of the deed, relating to the making, repairing, or protection against the sea, of the said road or any part thereof, or to any of the covenants, agreements, or powers therein contained, then, in such case, such dispute should

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be referred to the arbitration of *James Beadel*, or if dead, or unable, or unwilling to arbitrate, then to the arbitration of three indifferent persons, one to be chosen by each of the parties disputing, within fourteen days after either of them should have made to the other a requisition in writing to that effect, and the third by the two persons first chosen, within fourteen days after they should have been themselves chosen.

Clause 3. "That *James Beadel* may arbitrate at the request of either of the parties disputing, or, in case of his death, or unwillingness, or inability to act, either of the parties shall, by writing under his or her hand and seal, require the other to refer the said matter to arbitration, and to name some person as arbitrator; and if the party to whom the requisition shall be made, shall for fourteen days neglect or refuse to comply therewith, or shall name a person who shall neglect or refuse to act, then, and in every case, it shall be lawful for the person chosen arbitrator on behalf of the party making such requisition, in writing under his hand, to appoint some person to act as arbitrator on behalf of the party who, or the arbitrator named by whom, shall refuse or neglect as aforesaid, and such two persons shall name a third.

4. "That the arbitrators, or any two of them, shall determine and award concerning the matters referred to.

5. "That the parties disputing shall obey and abide, observe and perform, the award of the said arbitrators, or any two of them, so as the award of the arbitrators, or of such two of them as shall concur, be made in writing under their hands, and be ready to be delivered to the parties, or such of them as shall desire the same, within three calendar months next after the third of such arbitrators, for the time being, shall have been named.

9. "That any reference to arbitration may, by virtue of these presents, be made a rule of Court of any of Her Majesty's Courts at *Westminster*, and either party shall be at liberty to apply to the same Courts for that purpose, and to instruct counsel to consent thereto, for the other party."

James Beadel died in December, 1863.

The deed contained no power to enlarge the time for making an award under it. On the 18th of January, 1866, it was made a rule of this Court.

In January, 1866, *Robert Warner* appointed *E. K. Karslake*, Esq., his arbitrator. *Mary Powell*, on her part, appointed *J. K. Smythies*, Esq., as her arbitrator. Both these gentlemen consented to act. On the 19th of January, 1866, Mr. *Karslake* and Mr. *Smythies* met, and appointed *Thomas Stevens*, Esq., to be third arbitrator, who also consented to act, and a memorandum of his appointment was drawn up and signed on the 10th of February, 1866, and delivered to Mr. *Stevens*.

The arguments and the evidence in the matter were closed on the 9th of April, 1866, and on the following day the arbitrators met to discuss the award; on which occasion Mr. *Karslake* and Mr. *Stevens* came to a decision, in which Mr. *Smythies* refused to concur. Mr. *Karslake* undertook to prepare the draft of the award, and on the 21st of May submitted it to Mr. *Stevens* for approval, who made a few alterations, and returned it to Mr. *Karslake* signed. On the same day, Mr. *Karslake* affixed his signature, and sent it to Mr. *Smythies* for final consideration, who returned it unsigned, stating he declined to concur in the award. Mr. *Karslake* and Mr. *Stevens*, having made the alterations necessary, by reason of Mr. *Smythies* non-concurrence, caused the award to be engrossed, and executed it on the 29th of May, 1866.

On the 30th of May, Mr. *Stevens* wrote to the solicitors and agents of *Warner* and *Powell*, stating that the award was ready to be delivered on payment of the fees. On the following day it was taken up by *Warner*.

Mary Powell refused to abide by the award, on the ground that it had been made after the time.

Mr. *Karslake* and Mr. *Stevens* deposed "that the omission to draw up and have ready for delivery the award within the time, as well as an alleged irregularity in the execution of the award, occurred through mere inadvertence and unintentional oversight."

Mr. *Bacon*, Q.C., and Mr. *Cust*, for the motion:—

The only question in this case is, as to the jurisdiction of this Court to remit the matter back to the arbitrators, to correct a mistake, and to enlarge the time for making the award. Before the *Common Law Procedure Act*, the Court had only power to set

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aside the award, and the object of the 8th section of the Act was to enable the Court to remit it to the arbitrators to correct a mistake. In the case of *Mill* v. *The Master and Wardens of the Bowyers Company* (1), a si ilar question arose before Vice-Chancellor *Wood*, who decided that for such error, as would before the Act have vitiated the award, the Court had jurisdiction to send it back. In a later case of *Re Aitken's Arbitration* (2), the same learned Judge referred to his judgment in the former case, and decided in a similar way. It is clear, therefore, that, under the *Common Law Procedure Act*, s. 8, this Court has jurisdiction to correct this error.

Then as to the enlargement of the time. The 3 & 4 Will. 4, c. 42, distinctly enacts that where a submission is made a rule of any of His Majesty's Courts of record, the Court, or any Judge thereof, may enlarge the time. In *Browne* v. *Collyer* (3), this was done by the Court of Queen's Bench, and again in *In re Ward and The Secretary for War* (4). A similar course was also taken by the Court of Exchequer in *Anning* v. *Hartley* (5).

It will be contended that the statute 3 & 4 Will. 4, c. 42, applies only to Courts of law; but the 42nd section applies in terms to Courts of equity, and there is nothing in any part of the statute to limit it to Courts of law only.

The evidence shews there has been a mistake, through inadvertance, which, before the statute, would render the award null and void. It is clear, therefore, that the mere enlargement of the time, even without sending it back, will meet the exigency of this case, as the arbitrators have, in fact, made no award—that is, the present award is a mere nullity: *Johnson* v. *Latham* (6).

Mr. *Druce*, Q.C., for Miss *Powell*:—

This deed of submission gave no power to the arbitrators to enlarge the time; therefore no jurisdiction can be derived from the instrument.

The matter is entitled in two statutes, and from them the imputed jurisdiction must be derived. *Browne* v. *Collyer* is no

(1) 3 K. & J. 66.
(2) 3 Jur. (N.S.) 1296.
(3) 20 L. J. (Q. B.) 426.
(4) 32 L. J. (Q. B.) 53.
(5) 27 L. J. (Ex.) 145.
(6) 20 L. J. (Q. B.) 236.

authority that, under the 3 & 4 Will. 4, c. 42, the Court has jurisdiction to enlarge the time, because it appears from the report that the parties, by attending the reference, waived the objection, and, in effect, entered thereby into a new submission. In the later case of *In re Ward and The Secretary for War* (1), Mr. Justice *Blackburn* expressly rested his judgment on the fact that the arbitrator had power to enlarge the time, but had omitted to exercise it. That decision, therefore, is no authority for this case.

But, assuming that these cases are authorities in a Court of common law, they have no application here, because it is settled by authority that the 3 & 4 Will. 4, c. 42 (except as to the 42nd section) applies only to Courts of law: *Hall* v. *Ellis* (2). This case, therefore, stands clear altogether of that statute.

Then, can the application be supported under the *Common Law Procedure Act* (17 & 18 Vict. c. 125)? The matter is entitled in the 8th section only; but, on referring to that section, it will appear that the word used there, as denoting the tribunal to which the authority is given, is the word "Court;" but by the 99th section of the Act the word "Court" shall be deemed to mean "any one of the superior Courts of common law at Westminster." Courts of equity, therefore, are not within the meaning of the 8th section. Again, there are certain sections which refer to Courts of equity, and they are enumerated in the 103rd section, but the 8th section is not among them. There were good reasons for this course, as most of these matters, as in the present case, arise out of an action at law. But, further, the application is too late, as by the 9 & 10 Will. 3, c. 15, it ought to have been made within one term after the award: *Doe* d. *Banks* v. *Holmes* (3). He cited *Whitmore* v. *Smith* (4).

SIR JOHN STUART, V.C.:—

I was much struck with the case of *Hall* v. *Ellis*, but on closer examination, and looking at the reasoning of the learned Judge, it cannot govern this case.

The language of the 3 & 4 Will. 4, c. 42, is clear and distinct,

(1) 32 L. J. (Q. B.) 53.
(2) 9 Sim. 530.
(3) 12 Q. B. 951.
(4) 7 H. & N. 569.

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and the Act is free from the difficulty which often arises from the interpretation clause. The words used in the 39th section are general, and embrace in terms all the superior Courts of record. On the language of this statute, I am of opinion that Courts of equity are within the scope of the statute, as to all matters within their ordinary jurisdiction, and therefore have the power to enlarge the time for making an award where the submission has been made a rule of this Court.

There are two ways of construing an Act of Parliament—one to extend it to every case reasonably within its operation, and the other to lay hold of every expression to limit and curtail the intention of the Legislature.

It is the duty of Courts of justice to give that construction which most fairly carries out the manifest purpose.

In my opinion, the Court has jurisdiction, under the *Common Law Procedure Act*, in this case to remit the matter back to the arbitrators. The question is perhaps somewhat embarrassed by the interpretation clause of the *Common Law Procedure Act*, so far as the jurisdiction of Courts of equity is concerned. But Vice-Chancellor *Wood*, in *Re Aitken's Arbitration* (1), was clearly of opinion that this Court has jurisdiction under that statute, and, looking at the general words, they extend the jurisdiction to this Court, and, in the 17th section, Courts of equity are expressly referred to. It has been contended that the question is not cognizable in this Court. But this Court has an inherent jurisdiction in all matters of mistake and omission.

The time, therefore, must be enlarged for two months, and the matter remitted back to the arbitrators to make their award. Each party must bear his own costs.

Solicitors for Mr. *Warner:* Messrs. *Paddison & Son.*
Solicitor for Miss *Powell:* Mr. *Fry.*

(1) 3 Jur. (N. S.) 1296.

MOORE *v.* WEBSTER.

V.-C. S.
1866
Dec. 10.

Tenancy by Curtesy—Exclusion of Marital Right.

Where real estate is limited to the separate use of the wife, so as to leave to the husband no legal or equitable interest in the estate, he cannot be tenant by the curtesy.

THIS was a special case.

William James, by his will, dated the 10th of August, 1841, gave, devised, and bequeathed, all his estate and effects, real and personal, from and after the decease, or second marriage of his wife, to his children which should be then living, share and share alike, as tenants in common, to hold to them, his said children, their executors, administrators, and assigns for ever, or for and during all his estate, term, and interest therein. The will then continued:—

"But if any of my children be daughters, to hold to them or her, independently of any husband or husbands she or they may have, and free from his and their control and liabilities, and to be assigned and disposed as she or they may think fit, by any deed or will in writing; and I direct that in the event of any of my children being daughters, that my said trustees, hereinafter named, shall put her or their share or shares out at interest on good freehold security, and pay her or them their interest for the same, she or they not being allowed to touch the principal without the consent or concurrence of my said trustees, or the survivor of them."

The testator died on the 26th of November, 1848, leaving him surviving two daughters, and one son, *Agnes E. James, Hannah J. James,* and *Edward V. James,* and his widow.

On the 20th of October, 1850, *Agnes E. James* married the Defendant, *E. Webster;* no settlement was made on the marriage. On the 6th of December, 1850, the testator's widow died, never having married again. In March, 1860, *Agnes E. Webster,* the testator's daughter, died intestate, leaving her husband and one child, her heir-at-law, her surviving.

V.-C. S. 1866. MOORE v. WEBSTER.

Doubts having been raised whether the husband of *Agnes E. Webster* was entitled to the rents and profits of her share of the testator's real estate as tenant by the curtesy, a special case was prepared for the opinion of the Court on that question, and two others, which do not require a report.

Mr. *Freeling*, for the husband:—

It is well settled on the authorities that a husband may be tenant by the curtesy of the wife's equitable estate.

In this case the gift is absolute. In *Roberts* v. *Dixwell* (1), where the testator directed his trustees to convey a fourth of his lands to the separate use of his daughter, though the decision was against the husband on other grounds, Lord *Hardwicke* said if the wife's interest there had been an estate tail the husband would have been tenant by the curtesy, notwithstanding the restraint on the husband, though this Court would prevent his intermeddling with the estate during the wife's life. In *Morgan* v. *Morgan* (2), where there was a direction to pay the rents and profits to the separate use of the wife during coverture, Sir *John Leach* held that the husband was tenant by the curtesy in his wife's separate realty, unless the husband was wholly excluded from enjoyment of the wife's property. In *Follett* v. *Tyrer* (3) the Vice-Chancellor of *England* followed the decision in *Morgan* v. *Morgan*, and approved of it. The only authority at variance with these decisions is that of *Hearle* v. *Greenbank* (4), but that decision is quite inconsistent with the same learned Judge's decision in *Roberts* v. *Dixwell*, and was not followed by Sir *John Leach* in *Morgan* v. *Morgan*. The true criterion is, whether the husband is wholly or only partially excluded from taking an interest in his wife's real estate.

In *Sweetapple* v. *Bindon* (5), though the wife was only entitled to land "to the only use of the wife for life with remainder over," the husband was held to be tenant by the curtesy. Of course the husband might be excluded by express words, as in *Bennet* v.

(1) 1 Atk. 607-9.
(2) 5 Madd. 408.
(3) 14 Sim. 125.
(4) 3 Atk. 716.
(5) 2 Vern. 536.

Davis (1), but here all that exists is a power on the part of the wife to exclude him.

Mr. *John Pearson*, for the infant :—

It is now well settled that the fee may be settled on a married woman to the exclusion of her husband: *Hall* v. *Waterhouse* (2); *Taylor* v. *Meads* (3); *Atchison* v. *Le Mann* (4).

The real question is, is the husband's marital right wholly excluded, because, if so, this claim must fail.

In *Roberts* v. *Dixwell* (5) the whole interest was not settled, but only the wife's interest during coverture. This was the principle on which *Hearle* v. *Greenbank* (6) was decided. The dictum in the former case was quite irreconcilable with the decision in the latter.

In *Morgan* v. *Morgan* (7), the exclusion was only partial, *i.e.*, as to the life estate. The residue of the estate was not limited to the separate use, and the husband's rights attached. The same observation applies to *Follett* v. *Tyrer* (8).

As to the power of a married woman over freehold property for life, he referred to *Lechmere* v. *Brotheridge* (9).

Mr. *Bacon*, Q.C., and Mr. *Ince*, appeared for a daughter, but took no part in the argument.

SIR JOHN STUART, V.C. :—

The authorities are as clear as the principle.

Real estate may be limited to the separate use of a wife, so as not to exclude entirely the husband's marital right; and, unless his marital right be wholly excluded, he is not necessarily excluded from being tenant by the curtesy. But there is no authority, and no principle, contrary to the case of *Hearle* v. *Greenbank*, where it is laid down, that where there is neither legal nor equitable seisin, the husband cannot be tenant by the curtesy. Lord *Hardwicke*,

(1) 2 P. Wms. 316.
(2) 13 W. R. 633.
(3) 13 W. R. 394.
(4) 23 L. T. 302.
(5) 1 Atk. 607.
(6) 3 Atk. 716.
(7) 5 Madd. 408.
(8) 14 Sim. 125.
(9) 32 Beav. 353.

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Sir *John Leach*, and Sir *Lancelot Shadwell*, have held that where the husband is not excluded from all interest in the fee, though he may be from the life estate, he is not excluded from being tenant by the curtesy. In this case, however, the words operate as a total exclusion of the whole marital interest, and the case for the husband fails.

The case must be answered accordingly.

Solicitors for the Infant: Messrs. *Cunliffe & Beaumont.*
Solicitors for the Husband: Messrs. *Vizard, Crowder, & Co.*

V.-C. S. 1867 Jan. 23.

WILCOX *v.* MARSHALL.

County Court Jurisdiction in Equity Act (28 & 29 *Vict. c.* 99)—*Specific Performance of a Lease.*

Agreements for leases are within the 4th clause of the 1st section of the *County Court Equity Act*, authorizing decrees for specific performance.

THIS was an appeal from the County Court of *Gloucestershire*, held at *Bristol*, on the 21st of November, 1865, before *E. J. Lloyd*, Esq.

By an agreement, dated the 8th of October, 1863, *James Marshall* agreed to grant a lease to the Plaintiff, *George Wilcox*, of a dwelling-house, orchard, and premises, situate at *Wringdon*, for a term of ten years, from the 25th of March, 1864, at a rent of £24 per annum.

The plaint stated the above agreement; that the Defendant *Marshall* had refused to grant the lease; prayed for specific performance of the agreement; and for the costs of the suit.

The Defendant filed a statement, in which, among other things, he submitted that the County Court had not jurisdiction in the plaint, the agreement not being for sale or purchase.

On the 23rd of November the Court below decreed specific performance, with the usual directions, and costs on the higher scale.

Against this order the Defendant now appealed.

Mr. *Freeling*, for the Appellant:—

The question raised by this appeal is, whether the County Courts have jurisdiction to entertain plaints for the specific performance of agreements to grant leases. The question turns entirely on the construction of the statute.

The Act 28 & 29 Vict. c. 99, s. 1, directs that the County Courts should have and exercise the power and authority of the Court of Chancery in the matters thereinafter mentioned. The 4th rule of the 1st section is as follows: "In all suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property, where the purchase-money shall not exceed the sum of £500." There can be little doubt that the word "of" is omitted next after the word performance, and supplying that word the construction will be natural and consistent, viz., that the Court has jurisdiction in all cases for the specific performance of any agreement, or for cancelling or delivering up any agreement for the sale or purchase of any property where the purchase-money does not exceed £500. This construction would accord with the language of the 5th clause of the 10th section, which defines the Court where proceedings under the Act are to be taken. The 5th clause of the 10th section is as follows: "Proceedings for the specific performance, or the delivery up or cancelling of agreements, shall be taken in the County Court within the district of which the Defendants, or any one of them, resides or carries on business." This is the corresponding clause of the statute, and here the word "of" applies to the whole section. But unless the Court puts this construction on the Act, which is otherwise ungrammatical, it would result that the County Court might entertain suits for specific performance to grant leases involving property to an unlimited amount, against which there is no appeal but to the Vice-Chancellor. And secondly, the Court would hold that the 5th rule embraced matters totally dissimilar.

This construction would restore, in a worse form, the evil that was got rid of by the abolition of claims. In one case, *Cox* v. *Slater* (1), Vice-Chancellor *Kindersley*, though he made no order,

(1) 14 W. R. 665. 12 Jur. N.S. 542.

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seems to have thought that agreements for leases were not within the Act, and Mr. *G. L. Russell*, in the *Bloomsbury* County Court, so decided. It is to be observed that the form of plaint given in the General Orders refers to purchase and sale. On these grounds it is submitted that this appeal must be allowed.

Mr. *H. F. Bristowe*, for the Respondent, was not called on.

SIR JOHN STUART, V.C.:—

It is the duty of the Court not to alter a decision brought in review before it merely because another view, perhaps as good, may be presented. In matters involving discretion it is often very difficult to say with certainty which decision is right, and in this case I am told that Vice-Chancellor *Kindersley* and Mr. *George Lake Russell* have held one way, and Mr. *Lloyd*, whose judgment is now appealed from, has decided in another. I am the more impressed with the importance of this question because my decision is final.

The Act enlarging the jurisdiction of the County Courts gives power to them to entertain suits for specific performance of agreements, and the question is, whether agreements for leases are within the Act. It is contended that in terms the Act only refers to agreements for sale and purchase, and there is much in the language to countenance that construction, but looking at the whole section I do not feel justified in putting that construction upon it. The Act declares that the County Courts shall have jurisdiction in all suits for specific performance, and there are no words to cut down the meaning of those words from their natural signification. Then it is said that agreements for leases, and agreements for sale and purchases, are matters different in their character, and would not be embraced in one section; but the 5th clause does embrace the performance of agreements in the same clause with the cancelling or delivering up of agreements, things quite dissimilar, and therefore that argument fails. Then it is said that, if the County Courts have jurisdiction to decree specific performance of agreements to grant a lease, there is no limit to the amount, because the sum of £500, which is the limit of the jurisdiction, is, in this clause, clearly applied to purchase-money, and if the amount is only

limited in cases of purchase and sale, there is no limit as to the value in the case of an agreement to grant a lease; and, secondly, it is said that in such a case the ultimate appeal to the House of Lords would be lost. But, looking at the general purview of the Act, it limits the jurisdiction to cases where the subject matter does not exceed £500; and by the 9th section of the Act it is the duty of the Judge before whom a matter is pending, in case it appear that the subject matter of the suit exceed £500, to transfer it to this Court. These enactments as to value are general, and apply to all suits in County Courts. With all these safeguards provided by the Legislature I cannot see any grounds for holding that a literal construction of this clause of the statute will be attended with the danger and inconvenience suggested. On the contrary, I believe that such a construction will be for the public benefit.

It is said that there are no means of ascertaining, in case of a lease, what is the money value, so as to determine the proper jurisdiction. The value may doubtless vary, but I do not apprehend there will be any difficulty on this point. In the present case £24 a year for ten years would give a maximum value of £240. That is clearly within the amount prescribed by the Legislature.

On the whole there are no sufficient grounds for this appeal, and it must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Vizard & Co.*
Solicitors for the Respondent: Messrs. *Meredith, Lucas, & Co.*

V.-C. S.
1866
Dec. 10.

DONALDSON *v.* GILLOT.

Fraudulent Transfer—Railway Shares—Purchaser for Value.

A broker employed by the Plaintiff to purchase shares, which the Plaintiff paid for, procured the instrument of transfer to the Plaintiff, and the Plaintiff's signature thereto, and received from the Plaintiff the certificates and transfer for the purpose of registration; soon afterwards he fraudulently procured the Plaintiff to cancel his signature to the transfer, and by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them to one of the Defendants:—

Held, that the effect of the first transfer was not destroyed by the cancellation fraudulently procured, and the registration in the name of the broker, and the transfer to his mortgagee, were decreed to be set aside.

In January, 1865, the Plaintiff instructed one *Alphonse Gillot*, a broker whom he had previously employed in the purchase of stocks and shares, to purchase for him 500 shares in the *Scinde Railway Company*. On the 27th of January, 1865, *Gillot* purchased of a Mr. *Spurling* 500 shares in the company for the account of the 14th of February, 1865, and on that day he delivered his account for £967 10*s*., and received from the Plaintiff a cheque for that amount. On the same day *Gillot* gave to *Spurling* the Plaintiff's name as the purchaser, and *Spurling* delivered to *Gillot* the certificates of the shares, with a transfer from one *A. F. Govett*. A few days afterwards *Gillot* called on the Plaintiff with the said transfer, and procured the Plaintiff's signature to it in token of his acceptance thereof. *Gillot* then, by the Plaintiff's direction, took away with him the transfer and the share certificates for the purpose of leaving them at the office of the railway company, with a view to have them registered in the Plaintiff's name. On the 23rd of February, *Gillot* again called on the Plaintiff with the transfer with the Plaintiff's name cancelled, and represented to the Plaintiff that a clerical mistake had been made in the transfer, and it had thereby become useless, and that he had therefore cancelled it. He produced a new transfer, as from the vendor to Plaintiff, but not executed by the vendor, which he requested the Plaintiff to sign, which he did. After the 23rd of February the

Plaintiff made several applications to *Gillot* for the transfer and the certificates, but the latter evaded complying with the request. It appeared from the evidence, that on the 24th of February *Gillot* brought the cancelled transfer, and also a fresh transfer to himself, to a Mr. *Kew*, Mr. *Spurling's* agent, and represented to him that the Plaintiff did not require the shares, and that he, *Gillot*, would take them himself. *Kew*, relying on the truth of this assertion, procured from *Govett* the execution of the fresh transfer. Prior to the 13th of March the shares were registered in the company's books in *Gillot's* name.

On the 17th of March, 1865, *Gillot* borrowed from the Defendant *Pulley* £5000 on his I.O.U.; on the 20th, *Gillot*, not being prepared to repay the loan, *Pulley* agreed to continue the loan on obtaining security, which the rules of the *Stock Exchange* compelled him to require within two business days, to enable him to prove against a defaulter's estate. *Gillot* thereupon proposed to give (among other things) the shares in question in this suit, which *Pulley* agreed to accept, having ascertained that the shares were registered in *Gillot's* name. Late in the afternoon of the 20th, *Gillot* handed *Pulley* a transfer executed by him, but unstamped. *Gillot*, on *Pulley's* requisition, the next day transferred the shares by deed of transfer duly executed by *Gillot*, and on the same day, and again on the 24th of March, *Pulley* sent the certificates and transfer to the office of the company for registration, but the books were closed.

On the 31st of March, 1865, *Gillot* was adjudicated bankrupt, and on the 3rd of May, 1865, *Pulley* was appointed the creditors' assignee.

Mr. *Bacon*, Q.C., and Mr. *Currey*, for the Plaintiff:—

The Plaintiff has not been guilty of neglect or *laches*, but has been fraudulently deceived by the broker whom, in the common course of business, he had employed. On principle, therefore, he ought to be protected against the fraud.

A somewhat similar question arose in the case of *Tayler* v. *Great Indian Peninsula Railway Company* (1). In that case the Plaintiff's broker obtained from him blank transfers, with stamps sufficient to pass £20 shares held by the Plaintiff in that company,

(1) 4 De G. & J. 559: 5 Jur. N.S. 1087

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and filled them in with the description of these shares, leaving the names of the transferrees in blank. He then sold them to jobbers, who disposed of them in the ordinary way, filling in the names of the ultimate purchasers. On a bill filed by the original holder, the Court held the blank transfers void. In that case it was argued that the Plaintiff there had been guilty of negligence, and must bear the loss; but Lord Justice *Turner* said (1), that to apply to a case of that kind the rules insisted on, which were established for the purpose of protecting persons who might otherwise be defrauded, would be to facilitate instead of defeating the practice of fraud. That is a stronger case than the present one, because this Plaintiff has been guilty of no negligence whatever. But even supposing that the Plaintiff's belief in the statement of the broker, that the first transfer was defective, amounted to negligence, it is clearly not such negligence as to disentitle him to relief by the Court. In the case of *The Bank of Ireland* v. *Trustees of Evans's Charities* (2), certain incorporated trustees had allowed their great seal to remain in the custody of their secretary, by whom a fraud was perpetrated by improperly affixing the seal. A question having arisen at law, on whom the loss should fall, the Judge who tried the case told the jury that if they were of opinion that the trustees had so negligently conducted themselves as to contribute to the loss, the Defendants (the bank) were entitled to the verdict. But the House of Lords held that this direction was wrong.

Again, on payment of the money and execution of the transfer, the Plaintiff was entitled to be placed on the register, and the fraudulent cancellation of the instrument did not deprive him of that right, even at law: *Ward* v. *South Eastern Railway Company* (3); *Copeland* v. *North Eastern Railway Company* (4); *Reg.* v. *General Cemetery Company* (5).

[*Hare* v. *London and North Western Railway Company* (6), was also cited.]

Mr. *De Gex*, Q.C., and Mr. *Druce*, for the Defendant *Pulley*:—

It is the well settled rule of this Court that where one of two

(1) 4 De G. & J. 574. 5 Jur NS 1090
(2) 5 H. L. C. 389.
(3) 2 E. & E. 812.
(4) 6 E. & B. 277. 2 Jur NS 1162
(5) Ibid. 415.
(6) Joh. 722. 7 Jur NS 1147 (n)

innocent parties must bear a loss, that this Court will not interfere. In this case the Plaintiff allowed *Gillot* to retain possession of the certificates of the shares, which, under the 12th section of the *Companies Clauses Act* (8 & 9 Vict. c. 16), are evidence of title. He allowed him also to retain the cancelled transfer, bearing the Plaintiff's signature, and by means of these two documents enabled him to commit a fraud on the Defendant *Pulley*.

The case of *Tayler* v. *Great Indian Peninsula Railway Company* (1), has no application here; because in that case the transfer was void at law.

The principle of this Court is, that where the owner of property puts it into the power of another to represent himself as the owner, and to obtain credit from third persons in that character, the loss must fall on the true owner, rather than on those who have advanced their money *bonâ fide* and without notice: *Dodds* v. *Hills* (2); *Perry Herrick* v. *Attwood* (3).

Mr. *Marten* appeared for the company, and asked for his costs.

SIR JOHN STUART, V.C., after stating the facts, continued:—

Both the Plaintiff and the Defendant *Pulley* have suffered from the fraudulent conduct of *Gillot*, but the Defendant *Pulley* relies on alleged negligence on the part of the Plaintiff as disentitling him to relief in this Court.

The case as to negligence fails. The delivery to *Gillot* by the Plaintiff of the transfer and certificates for the purpose of registration, was an act not of negligence but diligence. The fraud was perpetrated on the 23rd of February by *Gillot*, who, by a false representation, procured the Plaintiff to sign another transfer, and then used for a fraudulent purpose the signature thus obtained. The fraudulent cancellation of the signature to the first transfer cannot annul the effect of it. *Pulley's* title is based on the sale which *Gillot* made to him, though *Gillot* knew well that the whole beneficial interest in the shares was vested in the Plaintiff, with whose money they had been purchased.

In this state of things the Plaintiff is entitled to the decree he

(1) 4 De G. & J. 559. 5 Jur. N.S. 1087 (2) 2 H. & M. 424.
(3) 2 De G. & J. 21. 4 Jur. N.S. 101.

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asks by this bill. No deed fraudulently obtained can prevail in this Court. No valid instrument which effectually conveys property can lose its effect merely by reason of its fraudulent cancellation or destruction. The only obstacle to the Plaintiff's title is the fraudulent cancellation of the deed in the agent's hand, by the fraudulent act of the agent himself. It is to be regretted that the Defendant *Pulley* should suffer, but as no laches has been proved against the Plaintiff, his prior and better title must prevail.

Solicitors for the Plaintiff: Messrs. *Skilbeck & Griffith.*

Solicitors for the Defendant *Pulley:* Messrs. *Travers, Smith, & De Gex.*

Solicitors for the Company: Messrs. *Thomas & Hollams.*

MINUTES.—Declare that the 500 shares in the company were, by the deed of transfer, duly transferred by *Govett* to, and vested in, Plaintiff as purchaser thereof, on consideration duly paid, and that Plaintiff is now entitled to the benefit of such transfer, and that the said deed of transfer was fraudulently cancelled, and that the subsequent transfers of the said 500 shares to *Gillot*, and by him to *Pulley*, were fraudulently obtained and are void, and ought to be set aside and cancelled, and decree the same accordingly. Declare that the registration of the said 500 shares in the name of *Gillot* was fraudulently obtained, and ought to be cancelled, and that Plaintiff is entitled to have the said shares registered in his name. Plaintiff to pay the company's costs, and *Gillot* to pay Plaintiff's costs of the suit, including the costs paid by the Plaintiff to the company.

CROSSLEY & SONS, LIMITED *v.* LIGHTOWLER.

V.-C. W.
1866
July 24, 31;
Nov. 13.

Injunction—Pollution of River—Additional Nuisance—Abandonment of Easement—Sale of Land on Bank of a Stream—Destruction of Vendor's Easement.

It is no answer to a Plaintiff complaining of a private nuisance to say that a great many other persons are committing the same sort of nuisance, and that the Plaintiff has admitted the fact by buying up the rights of some who have acquired rights against him; provided that a definite amount of injury can be clearly traced to the Defendant.

Mere non-user, for less than twenty years, of a privilege or easement to discharge foul dye-water into a stream is not in itself a proof of abandonment, which is a conclusion to be drawn from all the circumstances; amongst which the lying by, and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for twenty years, would destroy the easement, is a fact of great importance.

Actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement.

Circumstances under which the Court, on the whole, held that an abandonment had taken place.

A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river, *ad medium filum aquæ*.

A riparian owner, having a right to discharge foul water into the stream, if he sells land on the bank of the river, cannot claim a right (unless it be reserved in the conveyance) to continue to pour refuse into the water in front of the land sold, even though the water be not in actual use by the purchaser —not necessarily because the purchaser is the owner of half the bed of the river, but because every riparian owner has a right to use the water in its natural state, whenever he pleases, free from such obstructions to the flow as, if continued for twenty years, would become rights privileged by prescription.

THIS bill was filed on the 19th of May, 1866, to restrain the Defendants from suffering the foul water from their dye-works to flow into or foul the water of the *Hebble*, or from otherwise preventing or interfering with the Plaintiffs having the use and enjoyment of the water of the brook in its natural state.

The Plaintiffs were a company who, in November, 1864, had purchased all the estate and interest of Messrs. *John Crossley & Sons*, in the *Dean Clough Mills*, at *Halifax*, where they were now carrying on, as their predecessors had done before, from the year

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1840 (when *John Crossley & Sons* purchased the property and built the mills), down to 1864, the business of carpet manufacturers. Plaintiffs' property was situated on the *Hebble*, and for some distance above the mills included both banks of the stream.

In 1864, the Defendants, Messrs. *Lightowler*, became the occupiers of premises, of which the Defendants, Messrs. *Edleston*, were the owners, situate on an estate called the *Jack Royd* estate at *Wheatley*, near *Halifax*, on the north side of the *Hebble*, but at a considerable distance from the bank, about three-quarters of a mile above the Plaintiffs' mills. There they had recently completed building some large dye-works (the *Wheatley* works), and were now constructing others.

The bill stated that the Plaintiffs required large quantities of pure water for their manufacture, and that the fouling of the *Hebble* from the Defendants' works, which had previously been insignificant, began, shortly before Christmas last, to be considerable, and had since increased to such an extent as to injure the colouring of all the yarn printed by the Plaintiffs; and on one occasion, the 24th of April, to put a stop to work at their mills altogether.

The bill alleged the right of the Plaintiffs to a supply of pure water from the *Hebble*, not only in respect of their works at *Dean Clough*, but also in respect of a strip of land situate on the banks of the *Hebble*, a little below the *Wheatley* works which *John Crossley & Sons*, shortly before November, 1864, had agreed to purchase from the Defendants, Messrs. *Edleston*, and which, on the 9th day of January, 1865, was conveyed to the Plaintiffs by a deed, which, as the bill admitted and stated, contained the following reservations:—

"Saving nevertheless, and reserving hereout, unto the said *Dickinson Edleston* and *Robert Edleston*, their heirs and assigns, a right of taking and diverting water from the goit running through the same pieces or parcels of land to *Wheatley Corn Mill*, as heretofore enjoyed, and also a right of entry upon the said pieces or parcels of land, from time to time, for the purpose of opening drains or communications into the same goit, for that purpose, but for no other; and also saving and reserving unto the said *Dickinson Edleston* and *Robert Edleston*, their heirs and assigns, any drains or watercourses existing in or running through the said pieces or

parcels of land from the manufacturing premises of the said *Dickinson Edleston* and *Robert Edleston*, in *Wheatley* aforesaid, and adjoining and lying to the west of the piece of land firstly hereinbefore described, and expressed to be hereby conveyed, towards and into the said goit or reservoir hereinbefore mentioned."

The bill, however, alleged, and it was not denied, that the "manufacturing premises" referred to in the above reservation, were not the dye-works in respect of which the Defendants claimed a right to foul the stream, but a fulling mill. The bill alleged that by this purchase and conveyance the purchasers acquired a right to half the bed of the stream, and that without having made any reservation of such right, the Defendants were sending foul water over the moiety of the bed, upon which a quantity of foul matter was thus deposited.

The Defendants denied the right of the Plaintiffs, as riparian owners, to use the stream, except subject to the rights of themselves and others to foul it, and rested their case on four grounds: first, the ownership by the Messrs. *Edleston* and their predecessors of the *Jack Royd* estate, on which they said dye-works had existed for upwards of sixty years; secondly, the use and fouling of the stream by other dye-mill owners on the banks; thirdly, an arrangement said to have been made by the Plaintiffs with mill owners, named *Whitworth & Pilling*, about half a mile below *Jack Royd*, whereby Plaintiffs were allowed to lay down a pipe from a point above *Whitworth & Pillings'* works to *Dean Clough Mills;* and a compromise of legal proceedings for fouling the water, which the Plaintiffs had commenced within two years previously against Messrs. *Royston & Co.*, whereby the Plaintiffs had agreed to pay for the privilege of draining off the foul water from *Royston & Co's* mills into a reservoir on the Plaintiffs' land, where it was absorbed; and fourthly, the reservation contained in the above-mentioned deed of sale.

Mr. *Dickinson Edleston*, one of the Defendants, also deposed that they contracted for the sale of this land to a Mr. *Whitehead*, of *Halifax*, who stated that he wished to erect dye-houses thereon for his own use, and not until the draft of the conveyance was sent, were he and his brother aware that the Plaintiffs were the real purchasers. There was a considerable discussion between the

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vendors and purchasers as to the terms of the reservation, which was ultimately inserted in the deed as above; and Mr. *D. Edleston* said that the *Jack Royd* dye-works had a right of draining into the goit, which was referred to in the reservation, and that in the plan drawn on the conveyance was marked a drain for that purpose.

The Plaintiffs, by amendment, alleged that the modern nuisance was much greater than any ancient right of fouling which the Defendants might have; and in reply to the Defendants' affidavits setting up the above defences, brought evidence to shew that certain buildings on the *Jack Royd* estate, in respect of which the Defendants claimed the right to pour foul water into the stream, and which, prior to 1839, were standing and used for dye-works, were in that year abandoned by Messrs. *Edleston* and their predecessors, until Messrs. *Lightowler* came into possession, in 1864, by which abandonment, the Plaintiffs contended, all right, in respect of these dye-works, to foul the stream, had been lost.

The motion for an injunction, upon being made in June last, was ordered to be turned into a motion for decree; upon which the parties went into fresh evidence, and the result of the whole, so far as it related to the question of abandonment, is summed up in His Honour's judgment below.

The *Attorney-General* (Sir *H. M. Cairns*), Mr. *G. M. Giffard*, Q.C., and Mr. *C. Hall*, for the Plaintiffs:—

The Defendants admit that a certain amount of pollution is caused by them: but they say there are others who pollute the stream also, and that it is idle for us to complain of them in particular; at least before we have bought up all those who have a right to pour in foul water. But that is no answer to us: *Tipping* v. *St. Helen's Smelting Company* (1); *Wood* v. *Sutcliffe* (2). Nor can our arrangements with other persons confer any right upon the Defendants.

The Defendants allege a prescriptive right since 1839, when their premises were used as dye-works. But that user, as we say, was discontinued; and, if not, the limited user in 1839 does not justify a more extensive user in 1865 and 1866. If the De-

(1) Law Rep. 1 Ch. 66; S. C. 4 B. & S. 608, 616; affirmed in H. L. 5th July, 1865.
(2) 2 Sim. (N. S.) 163, 166.

fendants have altered the user, by enlarging it, they are wrong-doers for *the whole* of the enlarged user: *Gale* on Easements (1).

In our purchase deed of January, 1865, there are two reservations, but no express reservation of a right to pollute the stream in respect of the *Jack Royd* dye-works; and in an absolute grant there can be no implied reservation of easements (even though apparent and continuous) created by the grantor over the land granted, as servient to other land in his possession: *Suffield* v. *Brown* (2); *White* v. *Bass* (3). Even where the owner of a house and land sells the latter separately from the house, the purchaser may build on it as he pleases, and the vendor cannot prevent his doing so, although the building so erected may obscure the vendor's ancient lights: *Curriers' Company* v. *Corbett* (4).

On the question of abandonment it is laid down by Mr. *Gale* in his book on Easements (5), that a man may acquire a right of way over the land of another by enjoyment: and that after twenty years' adverse enjoyment the law will presume a grant: but if a party, who has acquired a right *by grant*, ceases for a long period (*it is said*, the period must be twenty years), to make use of the privilege granted to him, it may then be presumed that he has released the right. Where a party has once clearly signified an intention to abandon his rights, whether by words or acts, and has suffered others to act on the faith of such relinquishment, and to incur expense in doing the very act to which consent was given, it is then too late for him to retract his consent, and ask the persons to whom it was given to undertake the burden of restoring things to their former *status*: *Liggins* v. *Inge* (6). The question is thus one of intention; but if the owner of ancient lights pulls down the wall in which the windows were, and builds up a blank wall instead, and allows the blank wall to remain *for a considerable period of time*, the *onus* is on him to shew that the obstruction was temporary only, and not a permanent abandonment: *Moore* v. *Rawson* (7). See also *Tapling* v. *Jones* (8).

But it is immaterial whether, at the time of the sale to us, the

(1) 3rd ed. p. 495, 496 (*a*).
(2) 10 Jur. (N. S.) 111.
(3) 7 H. & N. 722.
(4) 2 Dr. & Sm. 355.
(5) 3rd ed. p. 502.
(6) 7 Bing. 682.
(7) 3 B. & C. 332, 336.
(8) 11 H. L. C. 290.

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Defendants had or had not the easement they claim, because a man cannot derogate from his own grant. On this principle, where a man is the owner of a house having the actual use and enjoyment of certain lights, and is also the owner of adjoining land; if he sells the house, neither he nor any one claiming under him can build upon the adjoining land (though sold as "building ground") so as to obscure or interrupt the enjoyment of the lights, although they be not ancient: *Swansborough* v. *Coventry* (1).

Apart from the want of evidence that a prescriptive right was acquired in 1839, there has been an interruption of a year and a half before the filing of the bill; and the user must be continuous for twenty years *next before* the filing of the bill: *Battishill* v. *Reed* (2); the gap of a single year is fatal: *Parker* v. *Mitchell* (3).

If there be any deleterious matter on the land, and it escape, the injury is at the peril of the owner: *Fletcher* v. *Rylands* (4).

Half of the bed of the river, *ad medium filum aquæ*, passed to us by the conveyance of the strip of land on the bank, by analogy to the conveyance of a highway: *Berridge* v. *Ward* (5).

If the right of the owners of the soil be once lost, a re-assertion of the right by the tenant will not be effectual as against strangers: *Bright* v. *Walker* (6).

Mr. *Rolt*, Q.C., and Mr. *E. E. Kay*, for the Defendants:—

The circumstance that there is pollution by others, raises the question of how much, if any, of the damage is occasioned by us. The buying up of other rights by the Plaintiffs, shews that it is not all occasioned by us.

If our right by prescription, prior to 1839, be disputed, we ask for an inquiry on that point.

[The VICE-CHANCELLOR:—If the question turns upon that, an inquiry will be necessary; but you should have asked sooner.]

As to the abandonment, there is a difference between an interruption which prevents the acquisition of rights, and an interrup-

(1) 9 Bing. 305; S. C. 2 M. & Scott, 362.
(2) 18 C. B. 696.
(3) 11 Ad. & E. 788.
(4) Law Rep. 1 Ex. 265.
(5) 10 C. B. (N. S.) 400, 415.
(6) 1 C. M. & R. 211.

tion which will amount to abandonment. Thus what took place on the *Jack Royd* estate between 1839 and 1864, may not have been sufficient to initiate a new right, although quite adequate to preserve the old. Where the continuous user necessary to keep alive a right depends upon the acts of man, the evidence of intention to continue is necessarily different from that which would apply to a natural enjoyment, such as a flow of water, or access of light.

As to the alleged excess, it is not proved; but if it were so, the excess would not vitiate the whole.

[The VICE-CHANCELLOR:—It may be that an increase of the discharge from the same building would not destroy the easement: but here you have enlarged your buildings.]

The additional building alone would not destroy the easement, if the servitude were not more onerous (1).

[The VICE-CHANCELLOR:—I confess I do not see how the whole right can be lost by increase.]

The earliest authority on the question of abandonment, is *Luttrell's Case* (2), where it was held that prescription was not destroyed by the pulling down of fulling mills, and converting them into corn mills. It has been repeatedly held, that a presumption of abandonment cannot be made from mere non-user: *Ward* v. *Ward* (3); the cesser of use must be coupled with an act clearly indicative of the intention to abandon: *Reg.* v. *Chorley* (4); *Liggins* v. *Inge* (5); and it is not so much the duration of the cesser as the nature of the adverse act, and the intention which it indicates, that are to be considered: *Reg.* v. *Chorley*; *Hale* v. *Oldroyd* (6). Moreover, the obstruction must be adverse; *Carr* v. *Foster* (7); whereas here there has been no adverse interruption of our right.

The purchase in 1864 was a mere device on the part of the Plaintiffs, shewing that they were in doubt as to whether they

(1) Gale on Easements, p. 485.
(2) 4 Rep. 47, *a*; Gale, 491.
(3) 7 Ex. 838.
(4) 12 Q. B. 515.
(5) 7 Bing. 682.
(6) 14 M. & W. 789.
(7) 3 Q. B. 581.

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could interfere with us in respect of their *Dean Clough* property.

With a conveyance, the only easements that pass to the grantee are continuous and apparent easements, necessarily used for the enjoyment of the adjoining land: *Pyer* v. *Carter* (1); *Suffield* v. *Brown* (2).

The fact of the plan annexed to the conveyance shewing a drain from the old dye-works to the reserved goit, has been wholly passed over by the Plaintiffs. There can be no doubt that they were cognizant of this drain.

This must be considered a servitude which the grant implies: *Ewart* v. *Cochrane* (3).

Mr. *Giffard*, in reply:—

In *Suffield* v. *Brown* there was no reservation in the conveyance of the rights claimed; it was the case of an implied reservation. Here there were express reservations in the conveyance, but no reservation of the right which the Defendants claim.

Pyer v. *Carter* is a decision in favour of grantees. Both cases establish this—that if a grantor makes a grant of property, reserving nothing, the grantee is entitled to everything which is absolutely necessary for the enjoyment of the thing granted, though it be not specified. *Pyer* v. *Carter*, also, was a case of a drain, which is a continuous easement—not of a right to pour dye-water into a river, which is discontinuous.

[The VICE-CHANCELLOR:—The decision was, that the vendor of both Plaintiff and Defendant might retain a right of which the Plaintiff could avail himself, though it was not stated in either conveyance.]

Undoubtedly; the right being apparent (upon careful inspection), continuous, and necessary for the enjoyment. *Suffield* v. *Brown* does not overrule *Pyer* v. *Carter*.

We rely on the principle that a man cannot derogate from his own grant, as shewn by *Swansborough* v. *Coventry* (4); *Elliot* v. *North Eastern Railway Company* (5).

(1) 1 H. & N. 916, 922.
(2) 10 Jur. (N. S.) 111.
(3) 4 Macq. 117.
(4) 9 Bing. 305.
(5) 1 J. & H. 145; 10 H. L. C. 333.

8 Jur. N.S. 817; 9 Jur. N.S. 555

Nov. 13. SIR W. PAGE WOOD, V.C., after stating how the suit had originated, continued:—

The position occupied by the Plaintiffs is twofold. First, they complain, as riparian proprietors of *Dean Clough*, that the proceedings which have been carried on by them for upwards of twenty-five years have been impeded; and, secondly, they allege, that they purchased, in the year 1864, of the proprietor under whom the *Lightowlers* claim, the property which borders the river in front of the *Jack Royd* estate: and they say, that, as riparian proprietors on that part of the river, although they have not erected any works there, they are entitled to the use of the water in its pure and natural state, at least so far as this user may not be impeded by works higher up the stream, which may have acquired easements against them; and that, without shewing that they are at this moment damnified, they have a right to restrain any working by the Defendants which will impede the free use of the water as it would otherwise come to them.

The case, therefore, is twofold, and on the latter branch of it, I confess, I had not much doubt at the hearing. I am of opinion that it is not competent for a person to sell property in front of a river, thereby constituting the person to whom he sells it the riparian proprietor, and then so to affect and damage the river as to make it useless for the ordinary and legitimate purposes to which the water may be applied; unless, indeed, there be reserved in the instrument conveying the land an express right to that user. In this particular case, so far from such a right being reserved, the right of user which was reserved is for another and a different purpose.

Now, as regards the remedy, perhaps it may be thought that in that state of things I might at once have granted an injunction to restrain the pouring in of foul water at this particular point; but it appeared to me that the case could not be dealt with piecemeal, for two reasons. First, damages are asked. Now of course there could be no damages as to this particular piece of land in front of the *Jack Royd* dye-works. At present no damage is alleged, except that the Plaintiff does say something about the soil at the bottom of the river having become dirty, and giving him some

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trouble to clean it. But, as regards the other and more serious part of the case to the present Plaintiffs, the question remains, whether or not they have been wrongfully injured by the damage which they have undoubtedly sustained at *Dean Clough* dye-works, or whether it is a *damnum sine injuriâ* (the Defendants justifying what they did in that respect under circumstances which may of course occur again should they, by any other means than through the immediate frontage of this land, pour the refuse of their dye-works into the river); and the further question, whether or not the Defendants can claim the privilege, as having been exercised by them in former times in respect of the same works, of fouling the river so as to interfere with the Plaintiffs' user of it. That of course, is a very serious matter to both parties, and it appeared to me right that the whole question should be determined at once, as the whole question was undoubtedly raised in the suit.

Now, as regards the *Dean Clough* works, on the evidence it is perfectly clear, and indeed it is not disputed by the Defendants, the Messrs. *Edleston*, that the *Dean Clough* works themselves have been established, as to a portion of them, for which water was drawn from the river *Hebble* to a reservoir, since the year 1840. Therefore, from the year 1840 the Plaintiffs have been entitled, at least for a part of their works, to use this water, and of course to use it in a pure state, unless the Defendants can justify that which was done in pouring foul water into the river. It is equally certain that nothing in the nature of that which the Defendants have at present in part achieved, and still further propose to do, namely, the pouring out of a mass of foul water from a large dyeing manufactory, has taken place there since the year 1839, until the works of the present Defendants were begun to be constructed, that is to say, for the period of at least twenty-six years. There have been certain works of what are called stovers and bleachers, and a small trade in dyeing cotton, the exact effect of which on the *Dean Clough* dye-works is in no way in evidence before me; nor does it appear whether it ever reached the *Dean Clough* works at all, they being three quarters of a mile down the river. To these I shall refer presently.

The Defendants' case is this. They say, in the first place, although it has been lightly thrown out, and could not have been

suggested with any effect, "You, the Plaintiffs, have really nothing to complain of, because, if our works were all away, you had such a fouling of the water before by various other mills, especially by a mill of one Mr. *Thomas Crossley* about a quarter of a mile higher up than our works, by certain wire works below, by certain cotton works of Messrs. *Holt*, which have been going on from 1856 to 1864, by the works of a Mr. *Pilling*, and by the works of some other persons down the river—that, wholly irrespective of anything we can or may do, your water must be so fouled as to be to you useless. That would still be so, were it not that you have bought up the rights of many of these parties, *Royston* and others; and if you had bought them all up, no doubt you might say you had acquired pure water; but it is idle to talk of pure water until those rights have been bought up." The very circumstance of the Plaintiffs buying up these rights, indicates the soundness of the rule of law which was laid down in the House of Lords, in the case of *St. Helen's Smelting Company* v. *Tipping* (1), namely, that you cannot justify an additional nuisance in the case of smoke, if it can be clearly traced to your new chimney, on the ground that the Plaintiff has had a great many nuisances to encounter before. If the nuisances that he has had to encounter before have been such that it is impossible to trace any evil at all to the work you are conducting with your new chimney, possibly the case may be otherwise; though even there it must be seen at once how unreasonable it would be to allow such an excuse; because the circumstance that a person who is so infested can buy up those who have acquired rights against him, is no reason why he should be compelled to submit to your additional nuisance until he has bought up all the rest. In this particular case, the question of law would be clearly against the Defendants, if the question of fact will bear out the decision. I think the question of fact does not arise here to embarrass the inquiry, because in this case we have numerous witnesses—so numerous that it is impossible to impute deliberate and wilful perjury to them; persons coming from the employment of the Plaintiffs, men who have been engaged in the *Dean Clough* works, some of them for thirty years, some for twenty-eight years, and the lowest, I think, for thirteen years, who all say that the

(1) 11 H. L. C. 642.

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pollution, though it occasionally occurred, was nothing like so frequent as the Defendants have averred. The dyeing and the washing of the wool was carried on at some other place for convenience sake, and, very possibly, on account of some degree of pollution in the river; yet the business was always going on, and the water was always used; and it was not until the month of April in the present year (the bill being filed in May), that the water became intolerable, and unfit to be used, and then the Plaintiffs follow the river up, and trace it distinctly to the foul water issuing from the Defendants' works. Therefore, on that part of the case I have no difficulty at all.

But the part of the case which occasioned me, on the eve of the long vacation, to take time to examine the evidence minutely, and to refer to the numerous authorities cited in the argument, was this:—

[His Honour reviewed the evidence, and said he considered it as proved, that in 1837 Messrs. *William Irving & Co.* carried on business as dyers at *Jack Royd*, and exercised there a right of pouring foul water into the *Hebble*. His Honour assumed, from the fact that the bill was framed so as not to question, or very lightly to question, the right to that user, that it had continued for twenty years at least before that date. The Defendants, of course only from information, put it at from sixty to one hundred years ago, and if anything had turned upon that, His Honour would have directed an inquiry, which now he did not think necessary. After Mr. *William Irving's* death, in 1837, his son *Thomas* carried on the business till 1839, when he became a bankrupt. Upon this, a great part of the plant and other things was sold and taken away. There was a dispute as to how much, and some of the witnesses went so far as to say the conduit pipes were removed, but this, His Honour thought, was a mistake. The business which had been carried on, was carried on wholly on the east side of the lane; and the only buildings in connection with the dye-works on the west side were a counting-house and two small store houses. The reservoir, also, His Honour thought, was on the east side. The buildings on the east side of the lane were thenceforward disused as dye-works until 1864. In the meantime *Thomas Sutcliffe*, who appeared to have obtained, in about

1841, some interest under the assignees of the bankrupt, *Thomas Irving*, granted a lease, for seven years, of the whole estate to *Thomas Holmes*, who was a dyer at *Dean Clough*. In 1844, *Thomas Holmes* (whose executors and devisees the Defendants, the Messrs. *Edleston*, were) purchased the estate; and in 1846 he let a portion of the property, not any part of the old dye-works on the east side of the lane, but only the buildings on the west side, to Messrs. *James & William Holt*, father and son, at a rent of £12 a year. There they carried on for some time the business of stovers and bleachers; and they sent bleaching liquid into the stream, which was not the nuisance now complained of. It was also in evidence that Mr. *Holmes*, up to 1844 (but the evidence stopped there), and before the lease to the *Holts*, washed some of his wools on the premises at *Jack Royd*, but this was only a slight amount of washing. In the year 1857, the *Holts* began to dye cotton, and this cotton dyeing went on until 1864, just before the purchase, by the Plaintiffs, of the lands on the *Hebble*, below the *Wheatley* works. Nothing more took place up to the date of the purchase. As to the comparative degree of offensiveness of cotton and woollen dyeing, the evidence was rather in favour of the Defendants, for it turned out that cotton dyeing was, if anything, more objectionable than wool dyeing. When the Plaintiffs' purchase took place, it was in evidence that nothing at all was going on at the old dye-works. The roof was off: Mr. *Robert Edleston* admitted that he and his brother, in 1850, removed the roof, but said that the roofs of dye-houses required to be often renewed, in consequence of their being destroyed by the work carried on in them. Soon after the Plaintiffs' purchase, the Defendants, Messrs. *Lightowler*, in November, 1864, came into occupation of the premises as purchasers, and they immediately began to rebuild the whole of the old premises of Messrs. *Irving & Co.* They next added about thirty-six feet of building to the works occupied by the *Holts*, and they proceeded to carry on a business which, as compared with that carried on by the *Holts*, was, undisputedly, in the ratio of fourteen to one. Messrs. *Lightowler*, indeed, said that Messrs. *Irving* did more work than they were doing; and if the question turned upon that, the case could not have been disposed of without an inquiry as to that also. But His Honour

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thought, on principles of law, the facts being as he had stated, that an inquiry ought not to be directed. The Plaintiffs contended, that long before the institution of the suit they had acquired the right in themselves of using the water for this particular dyeing purpose, that they were using it for that purpose, and that it was a valuable purpose. That was not even in dispute. The Defendants' contention was, that they had increased their works, and had expended large sums of money; but that the Plaintiffs were not aggrieved, though they had enlarged their works. It certainly was of importance, regard being had to the authorities, that the Plaintiffs had been allowed to expend large sums of money, whilst the *Jack Royd* works had, for twenty-five years, remained wholly unused. His Honour then continued:—]

The question of abandonment, I quite concede to the counsel for the Defendants, is a very nice one. On that a great number of authorities have been cited, which appear to me to come to this, that the mere non-user of a privilege or easement of this description, is not, in itself, an abandonment that in any way concludes the claimant; but the non-user is evidence with reference to abandonment. The question of abandonment is a question of fact that must be determined upon the whole of the circumstances of the case. In the case of *Stokoe* v. *Singers* (1), windows had been closed for twenty years, and nothing had been done in the meantime on the adjoining land; and then, just as the other owner was thinking of building on the adjoining land, the proprietor re-opened these long-closed windows, and it was left to the jury to say whether or not, by the long disuse, the person who had possessed this easement of light had induced the person who was commencing the building to expend any money, and to place himself in a worse position by reason of such expenditure? That was held to be a right and proper direction. It has been always held to be of considerable importance, that a person in possession of a certain right, and leaving the right wholly unused for a long period of time, and having given so far an encouragement to others to lay out their money, on the assumption of that right not being used, should not be allowed at any period of time to resume his former right, to the damage and injury of those who themselves

(1) 8 E. & B. 31.

have acquired a right of user, which the recurrence to this long disused easement will interfere with.

How unjust would it be, in a case like the present, if a person might say—as has been said in support of part of the case of the Messrs. *Edleston*—"I may lie by any number of years I please, and then I may resume the works in question." Messrs. *Edleston*, as representing *Holmes*, are aware of all that takes place, allow the Plaintiffs to go on increasing their business at *Dean Clough* for twenty-four or twenty-five years, and make no attempt, until the expiration of that period, to resuscitate the old works, and pour the refuse materials into the water. It appears to me that if that were allowed, no man would be safe on any river in the kingdom; for I suppose there is hardly a river in the kingdom where there has not been, at some time or other, a work which might be detrimental to a riparian proprietor lower down. If the right can be revived after twenty-five years, why not after fifty? or why not after a hundred? why, after any lapse of time, may not a right be resumed which would make the river utterly unfit for the purposes for which it was used in the interval? It must be taken to be within your knowledge that other persons are spending their capital on a business which has been long established, you, all the time, lying by, and taking no steps whatever till the expiration of that time.

Looking at the authorities (I do not go through them by name, for most of them are to be found in Mr. *Gale's* book) I certainly find none that would bear out such a proposition as the above. In one of them, *Ward* v. *Ward* (1), the question was as to the non-user, for more than twenty years, of a right of way. But suppose, during that period, somebody had been allowed to build his house across the way, can any one doubt that the doctrine of *Stokoe* v. *Singers* (2) would apply? The only evidence in that case was, that the Plaintiff had disused the right of way because he had a more convenient one. Nothing had been done by which any person had been prejudiced as regards the old right of way, so he was allowed to resume it.

One of the strongest cases is *Hale* v. *Oldroyd* (3), where Lord

(1) 7 Ex. 838.
(2) 8 E. & B. 31.
(3) 14 M. & W. 789.

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Cranworth expresses an opinion, which is always of the highest value, on the subject. In that case the Plaintiff had a right of drawing water from a river to fill an old pond. He had disused the old pond for some twenty or thirty years—at all events for a very long period—and was drawing the water off for three other ponds. At first, in an action brought against him for diverting the water into the three ponds, he justified his right; but this failing, he fell back on his right to draw water into the old pond. Lord *Cranworth* said, that if the old pond had been filled up, he thought it would have made no difference, because the Defendant was still drawing water, though to new ponds. Filling up the pond might have been used as evidence of the intention to abandon; but it was impossible to conceive that the Defendant intended to abandon the right, when he was actually drawing water into three new ponds instead of into the old. Therefore it was held no abandonment.

It was, indeed, put by Mr. *Kay*, who argued the case exceedingly well, and to whose argument I am much indebted, that there could not have been any abandonment, for this reason:—There was actual washing by *Holmes* of his own wool—not any dyeing—but a washing of wool in this place down to 1844. Then *Holmes* is found letting to other people, who do, in a certain sense, establish works which might create a nuisance in different parts of the premises on the west side (not on the site of the old dye-works), and who do carry on a petty trade (for such it really was) in dyeing cotton. That, it was said, ought to be taken as evidence of the intention to assert the right. But I cannot look upon acts of this description as amounting to anything, whilst the real dye-works remained desolate and waste for twenty-five years. Conceding at once that very strong evidence must generally be given of abandonment, yet such evidence need be much less strong when you have allowed (I will not say induced) any other person to assert rights which will be seriously and irremediably damnified by the re-assertion of yours after so long a period; and I take the law to be, that you cannot, after a period exceeding by five years the time in which the right may be acquired by any other person, when other persons have, in the meantime, acquired rights of user of the water, re-establish your right to

resume works again, which you have for that period left wholly unoccupied by a business of a similar description.

On this main point, therefore, which created the greatest difficulty, I think the Plaintiffs are right also.

With regard to the purchase—a point upon which, as I indicated, I had very nearly made up my mind at the hearing—I also think there would be a right to an injunction. In order to put the point of law as it stands on that branch of the case, I will assume that the right existed in the vendor in 1864. I will assume that he, having, as riparian proprietor, acquired the right to pour all his water through his property into the river, in 1864, sells a strip of land in front of his works to another proprietor, without any reservation of the right to pour in foul water, but—what is, of course, much stronger—reserving a right to the use of this water for another and a distinct purpose. The reservation contained in the deed is this: [His Honour read the reservation stated above.] The pleader has inserted in the bill the statement, which is fully borne out by the evidence, that the "manufacturing premises" mentioned in this clause were a fulling mill. It certainly does seem to me preposterous to say that a person can convey land to a riparian proprietor, and then claim the right of pouring his dirty water into it, if he pleases, when he has saved to himself the right of using a particular goit for another particular purpose.

A point has been raised which I think is not very material, but which, if material at all, must, on authority, be decided for the Plaintiffs; namely, whether or not half the bed of the river passed, because the conveyance appeared to point to a boundary which would not include the bed of the river. The point seems to have been distinctly decided in *Berridge* v. *Ward* (1), cited by Mr. *Hall*, where it was held that though there was an actual description of the property as bounded by the high road, nevertheless half of the high road passed, according to the common law, as following the right of proprietorship. So I apprehend here the right to half the bed of the river would follow the right of the riparian proprietor to the soil, if it were necessary to decide that question.

(1) 10 C. B. (N. S.) 400.

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But it does not seem to me at all necessary; because there is this point, that the riparian proprietor has the right to the use of the water, whenever he may want to enjoy it. It is quite true that at this moment it is not made use of by the Plaintiffs for watering their cattle, or for any other purpose; but they have a right to the user, and a right to interfere with anything that injures that right of user in such a manner as that, if not interrupted for twenty years, the person so injuring the right would acquire a title. That point has been decided by the House of Lords, in a case of *Bickett* v. *Morris* (1), reported since this case was heard. A discussion of this decision occurs in a very able article in the *Jurist* of September 15th, where the authorities on the subject are collected. Amongst the rest, a case is mentioned of *Sampson* v. *Hoddinott* (2), where Sir *W. Erle,* C. J., lays down the law thus: "It appears to us, that all persons having land on the margin of a flowing stream, have, by nature, certain rights to use the water of the stream, whether they exercise their rights or not; and that they may begin to exercise them whenever they will. If the user of the Defendant has been beyond his natural right, it matters not how much the Plaintiff has used the water, or whether he has used it at all; in either case his right has been equally invaded, and the action is maintainable." Here, for the words "beyond his natural right," I must substitute, "beyond what it is lawful for any one to do, who conveys land to another." That had been determined in *Swansborough* v. *Coventry* (3), which was cited in argument, and went this length: that a purchaser, at an auction, of a house which was described in the conditions as bounded by "building ground," was entitled to assert against the purchaser of this land from the same vendor, at the same auction, a right to prevent his building on the land against the house; inasmuch as, whether the properties were sold together or separately, the vendor could not derogate from his own act, and therefore any one claiming under him could not derogate from his act—wholly irrespective of any rights that might exist in windows—whether they were ancient lights or not—or the like.

(1) Law Rep. 1 H. L. Sc. 47. (2) 1 C. B. (N. S.) 590.
(3) 9 Bing. 305.

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The question between the parties is thus reduced to the single point: "Has the Defendant used the water as any riparian owner may use it, or has he gone beyond that limit?" Now, in the case I have mentioned of *Bickett* v. *Morris*, Lord *Cranworth*, in moving the judgment of the House of Lords, says this (1): "By the law of *Scotland*, as by the law of *England*, when the lands of two coterminous proprietors are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus* or bed of the river *ad medium filum aquæ*. The soil of the *alveus* is not the common property of the two proprietors," and so on. "The Appellant contended that, as a consequence of this right, every riparian proprietor is at liberty, at his pleasure, to erect buildings on his share of the *alveus*, so long as other proprietors cannot shew that damage is thereby occasioned, or likely to be occasioned to them." This, therefore, was a very strong case—that of a man putting impediments on his own soil in the *alveus* of a river, without any distinct evidence of any damage having been thereby occasioned. His Lordship proceeds:—"I do not think that this is a true exposition of the law. Rivers are liable, at times, to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand, what may be the effect of erecting any building in the stream, so as to divert or obstruct its natural course." Then he gives a number of reasons why that may be so, and he says:—"The owners of the land on the banks are not bound to obtain, or be guided by, the opinions of engineers, or other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, 'we have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily

(1) Law Rep. 1 H. L. Sc. 58.

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understood, and easily followed, and from which I think your Lordships ought not to allow any departure."

Lord *Westbury* concurs in this judgment entirely, and the principle, one sees at once, is applicable to the present case. It is this, "You, as a riparian proprietor, see something done which is not at all to your detriment now, but may hereafter be greatly to your detriment, though you cannot precisely point out how, or to what extent; if you do not interfere, a right will be acquired against you, by which you will hereafter be affected; and you have a right to say, things shall remain exactly as they were." That applies with equal, if not with greater force, to a case where a person says, "I am at this moment not using the water for the purpose of watering cattle, or of wool washing, or for any other purpose; but it is to a certain extent clear and undefiled, and you are pouring in an immense quantity of foul water into the river in front of my property; therefore I seek to restrain that which, in twenty years' time, will become a right." I think on that part of the case there can be no doubt at all, and I did not entertain much doubt about it at the hearing.

The case, then, being divided into these two branches, there must first be an injunction to restrain the Defendants, "from causing or suffering any foul water to flow from their dye-works into the river *Hebble*, above or within the limits of the land adjoining the river purchased by the Plaintiffs of the Defendants *Robert* and *Dickinson Edleston*, and conveyed to the Plaintiffs by the indenture of the 9th day of January, 1865, so as to affect the water opposite the said land, to the damage and injury of the Plaintiffs as owners of the said land, and of a moiety of the said river opposite thereto." Then, going to the other branch of the case, there must be an injunction to restrain the Defendants "from causing or suffering any foul water to flow from their works into the river *Hebble*, so as to affect the water drawn by the Plaintiffs from the river *Hebble* for the use of their dye-works at *Dean Clough Mills*, to the damage and injury of the Plaintiffs." Then an inquiry "whether any, and what damage has accrued to the Plaintiffs by the Defendants permitting any such foul water to flow from Defendants' works since the 19th of May, 1866," the date of the filing of the bill. The costs must, of course, be paid

by the Defendants to the Plaintiffs; and, as there is to be an inquiry, I must reserve further consideration, with liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Emmet, Watson, & Emmet,* agents for Messrs. *Wavell, Philbrick, Foster, & Wavell, Halifax.*

Solicitors for the Defendants: Messrs. *Edwards, Layton, & Jaques,* agents for Messrs. *Ingram & Baines, Halifax.*

STEWART *v.* AUSTIN.

Company—Recovery of Deposit—Principal and Agent—Jurisdiction—Excess of Authority—Trust.

Where a Plaintiff—having been struck off the register of a company by an order of the Court, on the ground of excess in the objects of the company, as shewn by the memorandum registered after he became a member, over those stated in a prospectus on the faith of which he took shares—filed a bill for the return of his deposit money against the directors who issued the prospectus, and the company, not alleging fraudulent intention:

Demurrer by the company allowed, on the ground that the money in their hands was not impressed with a trust:

Demurrer by the directors allowed, on the ground that mere excess of authority by an agent does not constitute equitable fraud, and that any relief in such case must be at law.

ON the 28th of June, 1866, the Plaintiff, *James Stewart,* on motion before His Honour, obtained an order to have his name struck off the list of contributories of the *Russian* (*Vyksounsky*) *Ironworks Company, Limited,* on the ground of material excess in the objects of the company, as stated in the memorandum and articles (registered after the date of his becoming a member), over those stated in a prospectus, on the faith of which he applied for, and obtained his shares; and the order was affirmed on appeal by the Lords Justices: *Stewart's Case* (1).

Mr. *Stewart* now (27th of July, 1866), filed a bill against the directors and the company, stating that the Defendants the directors, associated themselves together for the purpose of forming

(1) Law Rep. 1 Ch. 574.

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a company, and that on or about the 11th of April, 1865, they issued a prospectus, on the third page of which was a letter of application for shares in the following form:—

"Form of application for shares.

"No.

"To the directors of

"The *Russian (Vyksounsky) Ironworks Company, Limited.*

"Gentlemen—Having paid to your bankers the sum of £ , being a deposit of £1 per share on shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares, or any less number you may allot to me, and I agree to pay the sum of £4 per share on allotment, and I authorize you to insert my name on the register of members for the number of shares allotted to me."

The bill then stated that the Plaintiff, having received a copy of the prospectus, was induced by the statements therein contained relative to the objects and purposes of the company, to apply for shares; that on or before the 22nd of April, 1865, he applied for 100 shares in the form above, and that, "relying on the representations contained in the prospectus, and on the good faith of the Defendants in relation thereto," he paid a deposit of £100 into "the *Bank of London*, in the said prospectus described as the bankers of the company;" and that twenty shares were allotted to him.

It set forth the memorandum and articles (registered on the 28th of April, 1865); and alleged (par. 21) that the statement of the objects of the company in the memorandum differed widely and materially from the statement of the objects contained in the prospectus, and embraced several important purposes, of which no notice or intimation was contained in the prospectus; that the Defendants the directors registered the memorandum and articles without consulting the Plaintiff and the other original allottees of shares, and (save in one particular) without afterwards informing the Plaintiff, or the other original allottees, of the contents or provisions thereof; and that such registration was effected with the full knowledge on the part of all and each of the Defendants, that there was such variance. Further (par. 22) that the Plaintiff

never applied for, accepted, or intended to apply for or accept, twenty, or any shares whatever in the Defendant company, or in any company established for such objects as were specified in the memorandum; and until on or about the 30th of May, 1866, the Plaintiff was under the impression that he was a member of a company established for the objects shewn in the prospectus; also that he never authorized the Defendants, or any or either of them, to enter his name in the register of members of any company other than a company established for the objects shewn in the prospectus.

It stated the orders of the Court discharging the Plaintiff, as above mentioned, and alleged (par. 26) as follows:—

"The Defendant company received or allowed the application for its purposes and benefit of the said sum of £100, notwithstanding there was direct notice and full knowledge on the part of the company, and also of the Defendants the directors, of the circumstances under which, and means whereby, the said sum was obtained from the Plaintiff as hereinbefore mentioned."

The bill also alleged (par. 28) that the Defendants the directors had represented, and still represented, that they had applied the sum of £100 in a manner conformable to the terms of the prospectus and to their undertaking, and to their duty to the Plaintiff, in respect of the said sum; and that the Plaintiff had no sufficient relief except in that Court; and prayed for a declaration that the Defendants the directors, and the Defendant company, had constituted themselves, and that they were, or that they ought to be deemed, trustees for the Plaintiff of the said sum of £100; and that they were jointly and severally liable to make good to him the said sum and interest at 5 per cent. from the 22nd of April, 1865; and for payment accordingly.

To this bill the directors and the company demurred separately.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Fischer*, for the demurrers:—

The case is entirely new.

There is no equity to support the bill. It makes no case of trust. Half a century ago it was contended that if you paid money

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to a man for one purpose and he applied it to another, a trust was created, and a breach of trust committed. But that doctrine has been long exploded. Neither does the bill allege fraud, or even misrepresentation of any kind. Nor does it make a case of agency. It merely says that the Plaintiff paid the money "into the *Bank of London*, in the prospectus described as the bankers of the company."

If there be any remedy it is at law.

Supposing even it were held that in paying this money the Plaintiff made the Defendants his agents for the purposes of the partnership, the mere relation of principal and agent of itself is not sufficient to support a bill. In *Mackenzie* v. *Johnston* (1), it was held that a bill for an account by a principal against an agent will lie; but if the transaction be a single one, untainted with fraud, a bill is not sustainable; *Navulshaw* v. *Brownrigg* (2).

Barry v. *Stevens* (3); *Ex parte Greenwood* (4); *Ernest* v. *Nicholls* (5); *New Brunswick and Canada Railway Company* v. *Conybeare* (6); and *The Companies Act*, 1862, sects. 11 and 16, also referred to.

Mr. *J. N. Higgins* (with him Mr. *G. M. Giffard*, Q.C.), for the bill:—

The bill shews a state of circumstances, including misrepresentation, which amounts to equitable fraud.

[The VICE-CHANCELLOR:—Where is the allegation of misrepresentation? If a man is commissioned to buy *A's* horse, and he buys *B's*, that is not a misrepresentation.]

Misrepresentation is alleged in par. 28. The Defendants contend that they had a right to do what they have done. It is not necessary, in order to establish misrepresentation, to allege the formation of any preconcerted scheme. But this bill does (par. 21) allege previous knowledge, and that the articles were registered with that previous knowledge.

Equitable fraud may be presumed from circumstances, and

(1) 4 Madd. 373.
(2) 1 Sim. (N. S.) 573; S. C., on app. 2 D. M. & G. 441, 459.
(3) 31 Beav. 258.
(4) 2 Sm. & Giff. 95.
(5) 6 H. L. C. 401.
(6) 9 H. L. C. 711, 724.

there is a distinction in this respect between fraud at law and in equity: *Earl of Chesterfield* v. *Janssen* (1).

A factor or an agent, though not a trustee in the strict technical meaning of the word, yet if he deals with property, becomes a quasi-trustee, and Courts of equity will assume jurisdiction: *Foley* v. *Hill* (2); and if money be paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received: *Case* v. *Roberts* (3); *Towers* v. *Barrett* (4).

In this instance whom could we sue in an action for money had and received? Not the directors, nor the company, for the money was paid to their bankers, and we cannot sue the bankers.

A bill will lie to recover money paid upon bubble companies: *Colt* v. *Woollaston* (5); *Green* v. *Barrett* (6); *Harvey* v. *Collett* (7); *Cridland* v. *Lord De Mauley* (8).

The bill ought to be answered, on the broad ground that where there is an agency, followed by a breach of duty, and a misapplication of funds given for a particular purpose, by a person who may set up technical defences at law, the only remedy is in equity. In order to maintain an action against the directors, it must be proved that the money was paid away by their direction and for their use.

The VICE-CHANCELLOR:—I think the demurrer of the company must be allowed.

Mr. *Fischer* in reply, on the demurrer of the directors:—

The prospectus states certain objects for which the company is proposed to be formed. Afterwards the company is formed, not for different, but for similar, though wider, purposes, and there is no allegation or suggestion of fraud.

[The VICE-CHANCELLOR:—The only allegation is that you have rendered abortive the company in respect of which the money was paid.]

That is not alleged. The allegation is, that the Plaintiff paid

(1) 2 Ves. Sen. 125, 155-6.
(2) 2 H. L. C. 28, 35.
(3) Holt, N. P. 500.
(4) 1 T. R. 133.
(5) 2 P. Wms. 154.
(6) 1 Sim. 45.
(7) 15 Sim. 332.
(8) 1 De G. & Sm. 459.

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the money into the bank relying on the representations in the prospectus. What is that but a mere demand for damages under the guise of a bill in equity?

The case made by the bill amounts to no more than this—"I paid you money for one purpose, which money you applied to another." That may be a case of principal and agent, but certainly is not one of trustee and *cestui que trust.*

SIR W. PAGE WOOD, V.C.:—

I will first dispose of the case on the company's demurrer.

The bill alleges that the Defendants the directors associated themselves together for the purpose of forming a company; and they are the persons charged with issuing the prospectus, in which, after defining the objects of the company, they give the following form of application for shares:—[His Honour read the form of application set out above.]

As far, therefore, as that £1 per share is concerned, which is all that this gentleman has paid, it was paid to these same persons who, as directors, initiated the company. The letter says, "I have paid to your bankers"—that is, to the bankers of the directors, not of the company; in fact, the company was not yet formed. The company, which was subsequently formed on the 28th of April, has been held by this Court (by an order which has been confirmed on appeal) not to be the company to which the Plaintiff subscribed. The Plaintiff has been held to have subscribed to a company which was contemplated by the prospectus, and an entirely new company was afterwards formed, including the objects mentioned in the prospectus, but including also a variety of other objects. To this latter company, therefore, the Plaintiff is not bound—he never became a partner in it, and accordingly he has been discharged from being a member, and his name has been struck off the list of contributories. The matter then comes to this, that the Plaintiff has paid the directors of an intended company a sum of money, to be applied for the purpose of getting him shares to a certain amount in that company, which, *de facto,* was never formed. Then the bill states (I am now only on the demurrer of the company) that the new company having been formed, the directors handed over these deposits to the new com-

pany, and the case is put in this form:—[His Honour read par. 26 of the bill set out above.]

Now I apprehend it is impossible for the Plaintiff in this case to say: "I have handed over my money to certain directors, as my agents, for the purpose of being applied in getting me shares in Company *A*. They have handed the money over to another company, *B*., who knew for what purpose the money was originally paid, and thereupon Company *B*. became trustees for me, upon the principle of this Court, that persons holding trust moneys with a knowledge of the trust are fixed with that trust." If you pay money to your own bankers, directing them to apply it to a certain particular purpose — namely, the purchase of shares in a given company — and your bankers apply the money to the purchase of shares in another company, although that other company knew you had originally intended it to be for the former company, they could not be sued here as trustees. Your remedy would be against your bankers. I apprehend there has been no such trust created by anything which has been done by these directors, that the new company, thus formed, can be held responsible for any loss which the Plaintiff has sustained by misapplication. The Plaintiff could not at law, I believe, and he certainly cannot here, maintain a suit against the company.

Upon consideration, I also think the bill cannot be sustained against the directors on the allegation (for there is no averment), that this was a bubble company—in fact, nothing of that sort could be truly averred. As far as I can see by the bill, which is all I have to look to, and as far as I can suppose on the probabilities of the case if it had not been so stated, the directors received this money with no intent at that time to register a deed more extensive than the objects of the prospectus; they received it with a *bonâ fide* intention of doing what the prospectus said they were going to do—namely, to form a given company, with certain particular powers, to work a mine called the *Vyksounsky Mine*, and for certain objects immediately connected therewith. Having received that money, they invite subscriptions for that purpose—a purpose not at all known by them to be an impossible purpose; on the contrary, for aught I know, the purpose for which they have formed

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their company includes that, and something more. Probably the more limited purpose was more feasible than the larger one. There is nothing to shew, as in the cases which have been cited from *Colt* v. *Woollaston* (1) downwards,—nor is it even alleged —that the scheme was held out by way of fraud, for the purpose of inducing subscribers to pay their money under representations which were known to be inaccurate, or of objects which were not intended to be carried into full effect.

The money, therefore, was received simply for the purpose of carrying into effect the objects stated in the prospectus. It turns out afterwards that the directors enter into what has been held to be an improper transaction; the Court has relieved the Plaintiff from being bound by it; and the question arises of what is to be done about the money.

On the face of the bill I apprehend there is nothing to distinguish this from the common case of an agent receiving money without fraud for a particular purpose, and then applying the money —not for his own use, or in any sense that it can be said he is embezzling it, but in a manner not authorized by the principal. That is to say, being an agent for a particular purpose, for example, to go into the market to buy certain goods, he buys other goods, which the principal may reject, and say he will have nothing to do with. Possibly, if it were a case of a long conducted agency, and it turned out there had been a systematic disregard of instructions, that there was bad faith, or a complicated account, it might be a proper subject for a bill for an account of all dealings and transactions. But the authorities which have been cited shew that a bill will not lie, when all you can say is,—"I trusted my agent with money for a particular purpose; he has been guilty of a breach of duty, and has applied it to another purpose."

It is said by Mr. *Higgins* that there can be no recovery at law; and it certainly is not an immaterial observation, because if a person's money has been misapplied, and it can be shewn that there is no remedy at law, one would naturally look and see if a bill might not be sustained. But what is alleged here, and no doubt truly alleged, is, that the agents the directors have parted with this money to Company *B.* instead of forming Company *A.*, and

(1) 2 P. Wms. 154.

Company *B.* have received it, knowing that it ought to have been applied in the formation of Company *A.* That clearly takes it out of the class of cases to which Mr. *Higgins* referred. Where the purpose for which the money has been paid can still be answered, it does not follow that the holder will not form the company proposed; the object for which the money is being held may yet be attained. But *Case* v. *Roberts* (1), which was referred to as a leading authority, will not apply to such a state of things as appears on this bill which, I believe, recites all the facts exactly as they exist. The case made by it is simply this: "I have paid you, the directors, this money; you have made the scheme abortive; it cannot be carried into effect, because these *Vyksounsky* and other mines have been handed over to another company; nay more, you have handed over my money, and the whole thing is gone." In other words, "You have parted with my money for purposes other than those for which I handed it to you." Surely there must be a cause of action with regard to that.

I allow the demurrer of the directors, as well as of the company, on the simple ground that it is not fraud in the view of this Court where a person takes your money for a given purpose, and then, without your authority, applies it to a larger and more extensive purpose which he may think equally for your benefit—or, indeed, better for you; not attempting to apply it to his own use, but merely applying it to purposes which you have not authorized. That may be the case of an agent exceeding his authority, and being liable for breach of his duty; but it is not fraud in this Court. I must, therefore, allow both the demurrers on that ground.

Solicitors for the Plaintiff: Messrs. *Harrison, Lewis, & Co.*
Solicitors for the Defendants: Messrs. *Rickards & Walker.*

(1) Holt, N. P. 500.

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PENN *v.* BIBBY.
PENN *v.* JACK.
PENN *v.* FERNIE.

Patent—Certificate for Costs—Second Trial—Patent Law Amendment Act, 1852, *s.* 43—*Damages against Purchasers, in addition to Account against Manufacturer—Injunction not suspended pending Appeal.*

5 Eq 86.
5 Eq 118

The 43rd section of the *Patent Law Amendment Act*, 1852, empowers a Judge, before whom an action is tried, to certify on the record that the validity of the letters-patent in the declaration mentioned came in question; and it is enacted that the record, with such certificate, being given in evidence in any suit or action for infringing the letters-patent, shall entitle the Plaintiff in any such suit or action, on obtaining a decree, to his full costs, charges, and expenses, as between attorney and client, unless the Judge shall certify that he ought not to have such full costs:—

Held, that this section does not apply to the costs of a first trial (whether at law, or of issues of fact in this Court), but only to the costs of a second trial, upon production of the record of the first trial, with the certificate endorsed.

Where bills to restrain the infringement of a patent have been filed against both the person who manufactures and the person who uses the article, and issues of fact have been found for the Plaintiff, it is the right of the Plaintiff to have not only an account against the manufacturer, but also damages against the person using the article, wherever it be found.

After a trial before the Vice-Chancellor, without a jury, in which issues were found for the Plaintiff, a motion for a new trial having been refused by the Vice-Chancellor, and on appeal refused by the Lord Chancellor, was being taken by appeal to the House of Lords.

The Court declined to suspend the final order for an injunction pending the appeal to the House of Lords.

Ascertainment of Damages 5 Eq 81

THIS was the hearing of the causes, which were instituted to stay the infringement of a patent.

The two former cases of *Penn* v. *Bibby* and *Penn* v. *Jack* were tried together before His Honour without a jury, *Penn* v. *Fernie* to abide the result of the others. His Honour found for the Plaintiff on all the issues, and a motion for a new trial having been made before His Honour and refused, was taken by appeal to the Lord Chancellor, who, on the 6th of December last, dismissed the appeal motion with costs. (Reported 2 L.J. 127)

The Plaintiff now asked for an injunction; for an account against

Mr. *Jack*, the manufacturer of the articles; and an inquiry as to damages against the other two Defendants, who were users.

He also asked His Honour to give a direction for full costs as between solicitor and client, under the 43rd section of the *Patent Law Amendment Act*, 1852.

On behalf of the Defendant *Bibby* the Court was asked to postpone making any decree until the decision of the House of Lords on a petition of appeal from the Lord Chancellor's order, now lodged in Parliament, had been obtained.

Mr. *Grove*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Theodore Aston*, for the Plaintiff:—

We have been put to very large expenses in these suits. The Lord Chancellor not only confirmed the decision of this branch of the Court, in refusing a motion for a new trial, but he went further: he did not even consider our endeavour to reconcile the evidence of the Defendants' witnesses, so as to acquit them of perjury, successful.

The course now asked was adopted in *Lister* v. *Leather* (1). In that case the suit was instituted for infringement. The Plaintiff obtained an interim injunction, and then brought an action at law, in which he recovered. Supposing the trial of the issue in this case had been previous to the *Chancery Amendment Act*, 1858, this case would have been precisely within *Lister* v. *Leather*. In *Fernie* v. *Young* (2) Lord Chancellor *Westbury* expressly says that a preceding trial of an issue by this Court is analogous to the trial of an action at law, and not to the trial of an issue directed out of this Court. Hence *Lister* v. *Leather* is precisely in point, and, being since the *Patent Law Amendment Act*, shews that the section is not confined to cases where there has been a first trial, and the certificate is produced on a second. The word "such" in the clause, "before whom any such action shall be tried," relates to the former words "any action in any of Her Majesty's superior Courts," and means any action for infringing letters patent.

[THE VICE-CHANCELLOR said he would not call upon the Defendants as to the direction for costs.]

(1) 4 K. & J. 425.

(2) Law Rep. 1 H. L. 63, 71.

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PENN v. BIBBY.

PENN v. JACK.

PENN v. FERNIE.

Sir *Roundell Palmer*, Q.C., and Mr. *Kay*, Q.C., for the Defendant *Bibby*; and Mr. *Kay*, for the Defendant *Jack*:—

As to postponing the decree, the matter stands thus: under the statute we can only appeal upon an order refusing a motion for new trial; we cannot appeal against a judgment on the facts. If our petitions of appeal succeed we must have a new trial. Then is it desirable that the Court should make a final order till that question is disposed of?—an order which, so long as it stands, will be an impediment to our appeal against the order refusing a new trial? It will be almost unavoidable that we must delay our appeal against the Lord Chancellor's order until we have appealed against the final order of this Court.

As to damages, the injunction asked against Mr. *Bibby* is, "that the Defendant may be restrained from *using* or *exercising*, within the limits of the *United Kingdom*, the Plaintiff's invention, or any shafts or bearings for screw propellers, fitted with wood bearings or bushes, made in the mode described in the specification, and from *using or employing, or permitting to be used and employed*, within the limits aforesaid, any vessel fitted or provided with a screw propeller, having bearings or bushes, constructed and applied without the license of the Plaintiff." If the injunction be granted in these terms, if screw propellers are to be removed from all these vessels, we shall be unable to obey the injunction whilst the vessels are at sea, besides incurring great loss of time and expense by laying each of them up in dry dock when they come home. If the decree must be made now, Mr. *Bibby* is willing to pay the same royalties to the Plaintiff as other people pay, without prejudice to the appeal, or to pay them into Court pending the appeal.

Mr. *Grove* said he could not consent, on the part of the Plaintiff, to accept the same royalties from a litigant as from others, and it was contrary to the practice in patent matters that he should do so.

Sir *R. Palmer*:—

Such a mode of dealing with the public is not in accordance with the principles upon which privileges are granted to patentees.

The Plaintiff is not entitled to damages against the person

using, as well as to an account against the person manufacturing. He cannot have an account against the seller without adopting the sale; and if he adopts the sale, what right has he to get anything from the purchaser? If he files bills against both seller and purchaser, however the damages may be distributed amongst the two, he cannot recover from both in respect of the same ship. The consequence would be, that a patentee might follow an article into the hands of every one of a succession of purchasers for twenty years, and recover damages against each of them.

SIR W. PAGE WOOD, V.C.:—

With regard to the damages, it has never, I think, been held in this Court that an account, directed against a manufacturer of a patented article, licenses the use of that article in the hands of all the purchasers. The patent is a continuing patent, and I do not see why the article should not be followed in every man's hand, until the infringement is got rid of. So long as the article is used, there is continuing damage.

As to the rest, it is quite plain that the Plaintiff must have an injunction: but as I do not wish it to extend beyond the words of the patent, I confine it to "within the limits of the United Kingdom of *Great Britain* and *Ireland*, the *Channel Islands*, and the *Isle of Man*," striking out the words, "including the rivers, seas, and havens thereof."

I also think the Plaintiff is entitled to an account against Mr. *Jack*, if he desires it, though practically an account seldom turns out to be of much use, owing to the immense difficulty of separating the expenses of the patented article from the other expenses of ships.

Mr. *Grove* waived the account, and said he would take the remedy in damages.

SIR W. PAGE WOOD, V.C.:—

I think that is a very wise discretion.

My reason for not giving the costs, as between solicitor and client, is this: I consider that the 43rd section means that when a second trial for infringement takes place, the certificate by the

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Judge of the first action is produced in evidence on the second trial, and the extra costs are given to afford a complete indemnity. I did not intend to diverge from that in *Lister* v. *Leather* (1), and I doubt if I did, as actions and suits were both pending, and an action may be brought after suit. In *Betts* v. *De Vitre* (2) I declined to do it. In *Davenport* v. *Rylands* (3), I gave the certificate for costs *after* the first trial, but I have not done so *upon* the first trial.

With respect to the postponement of the decree, I consider it a matter of right that the Plaintiff should have a decree at once, and not be delayed. In *Betts* v. *Menzie* (4) I continued the injunction, notwithstanding the first decision of the Court of law being adverse to my view, but when the Court of Exchequer Chamber was also adverse (6) I dissolved the injunction. The House of Lords ultimately decided in favour of the view I took (7), but the injunction was lost in the meantime. That case was the converse of this.

As regards convenience, I think it obviously better to make the decree now, as the appeals from the Lord Chancellor's Order and mine can be brought on together.

As to the royalties, I cannot compel the Plaintiff to accept the same royalty from these Defendants as he receives from others. I cannot in the decree do less than give the Plaintiff his full right, and I cannot bargain for him what he may choose, or may not choose, to do. When an appeal is presented from the decree, that will be the time to make a special application on the subject.

There will be liberty to apply generally.

Solicitors for the Plaintiff: Messrs. *H. R. Hill & Son.*
Solicitors for the Defendants: Messrs. *Norris & Allen.*

(1) 4 K. & J. 425.
(2) 11 Jur. (N. S.) 9, 11.
(3) Law Rep. 1 Eq. 302, 308. 12 Jur. N.S. 376
(4) 3 Jur. (N. S.) 357.

(5) Reported 6 H. & N. 923. 5 Jur. N.S. 1164
(6) —— 6 Jur. N.S. 1290
(7) —— 8 Jur. N.S. 29

BOWYER *v.* WOODMAN.
Ex parte CLARKE.

V.-C. W.
1867
Jan. 22.

Mortgage—Arrears of Interest—Money payable out of Land—Statute of Limitations—3 & 4 Will. 4, c. 27, s. 42.

Where a married woman entitled, after the death of a tenant for life, to a share of a fund arising from moneys the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage, by deed acknowledged, of her reversionary estate, such mortgage containing a covenant by husband and wife to pay full interest:—

Held, that the wife's estate was "money payable out of land" within the 42nd section of the 3 & 4 Will. 4, c. 27; and that the mortgagee could not recover more than six years' arrears of interest on the mortgage of such an estate.

THIS was a summons by Mrs. *Clarke*, a married woman, to have a fund of £1663 0*s.* 7*d.* Bank Annuities, standing in Court to the credit of the cause, settled upon such trusts for her benefit as the Court should think fit.

Jeremiah Woodman, the father of Mrs. *Clarke*, by his will, devised real estate to trustees upon trust to sell, with the following declaration:—"That for the purposes of enjoyment and transmission under the trusts hereinafter contained, my estates shall be considered as money from the time of my decease." He then declared that the surplus of the sale-moneys, after payment of debts, should be invested, and that the trustees should permit or empower his wife to receive the income during her life; and that after her death as well the capital as the income should be in trust for all his children who should be living at his decease.

The testator died on the 6th of March, 1859, leaving four children. Mrs. *Clarke* was married in her father's lifetime.

The widow died in 1863.

On the 4th of June, 1860, Mr. and Mrs. *Clarke* joined in a mortgage, acknowledged by her, of her reversionary interest to *Carter*, for £400.

Amongst the questions raised on this summons, was a claim on behalf of *Carter*, the mortgagee, to have full interest from the 4th of June, 1860 (that is, for more than six years).

V.-C. W. 1867 BOWYER v. WOODMAN. *Ex parte* CLARKE.

Mr. *Roxburgh*, Q.C., and Mr. *Fischer*, for *Carter*:—

There is no limitation to interest short of twenty years, except under sect. 42 of the 3 & 4 Will. 4, c. 27, which limits interest to six years' arrears; but only as to money charged *upon land*. The question is, whether this is money charged on land.

Mr. *T. A. Roberts*, for Mrs. *Clarke*:—

This is a legacy, and hence no more than six years' arrears are recoverable.

But if not, that this is an interest in land is plain from the cases of *Tuer* v. *Turner* (1), and *Briggs* v. *Chamberlain* (2), which decide that the interest of a married woman in money, the proceeds of real estate devised upon trust for sale, will pass under the 77th section of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74). This, therefore, is an interest in land.

Nothing can turn upon the covenant in the mortgage deed, that being only the covenant of a married woman.

Mr. *Winterbotham*, and Mr. *Caldecott*, appeared for other parties.

Mr. *Roxburgh*, in reply:—

Not only did the will convert the land into money, but there is an express declaration to the effect that the estates are to be considered as money from the time of the testator's death.

The covenant in the deed extends to all interest.

The wife here is a redeeming party, and must do equity.

SIR W. PAGE WOOD, V.C.:—

It is beyond all question that this is the personal estate of the married woman; and that she can take it as money, and only as money.

Still it is an interest in land, which formerly would have passed by fine, and will now pass by deed acknowledged. What she has mortgaged, therefore, must be held to be within the words of the statute, "any sum of money charged upon, or payable out of any

(1) 24 L. J. (Ch.) 663. (2) 11 Hare, 69.

land;" and the mortgagee can claim no more than six years' interest. I put the covenant entirely aside, it being the covenant of a married woman.

V.-C. W. 1867 BOWYER v. WOODMAN. Ex parte CLARKE.

Solicitors: Mr. *R. W. Roberts*, agent for Messrs. *Clark & Collins, Trowbridge;* Messrs. *Bischoff, Coxe, & Bompas;* Messrs. *Nichols & Clark;* Messrs. *Wood, Street, & Co.*

PEARSON *v.* DOLMAN.

V.-C. W. 1866 *Nov.* 12, 13, 14.

Will—Vesting—Gift of Income defeasible, followed by Gift of Principal.

Bequest to the executor and a trustee, of the proceeds of a policy upon testator's life in trust so long as *A.* should not have committed any act of bankruptcy, to pay him the interest until he should attain twenty-five, so that he might not deprive himself thereof by anticipation, in which events *A.* was to lose all benefit of the provision, "my object being for the personal wants of *A.* until any of such events should have happened, and then for the good of his family." On the happening of any such event, the fund was to be in trust for the children of *A.*; but if *A.* should not then have any children, then, subject to a discretionary power in the trustees to pay *A.* any sums they might think proper, the trust moneys were to fall into the residue. The money received upon the policy was to be paid to *A.* upon his attaining twenty-five; in case he died under twenty-five, leaving any child or children, the trust moneys and interest thereof were to be in trust for the children of *A.* The will also contained a power of advancement for the benefit of *A.*

A. died under twenty-one, unmarried. He had never become bankrupt, or attempted to anticipate:—

Held, that *A.* took a vested interest in the money secured by the policy, subject to be divested in the event of bankruptcy or alienation, or of death under twenty-five leaving children, and that, as neither of these events had occurred, the interest remained absolutely vested in him.

MISS *WATKINS*, by her will, dated the 22nd of June, 1852, gave to her brother, *Fowell Watkins* (thereby appointed sole executor), and her cousin, *William Henry Watkins*, their executors, administrators, and assigns, the sum of £1000, secured to be paid to her legal personal representatives by the *London Life Assurance Society*, pursuant to the terms and conditions of a policy effected with such society, upon trust to invest the same sum, together with any accumulations by way of bonus added, or to be thereafter added or appointed, in respect of such insurance, when and so

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soon as the same should be received, in their names in government stocks, or other real securities, with power to vary the securities, and upon trust:—

"So long as my nephew *Thomas* shall be in solvent circumstances, and shall not have become bankrupt, or made any composition with his creditors, or have pledged his property for their benefit, to pay the dividends, interest, and annual produce of the said trust moneys, stocks, funds, and securities, to my said nephew, until he shall attain the age of twenty-five years, so that his receipts alone shall be good discharges for the same, and so that he may not deprive himself thereof by sale, mortgage, or otherwise by way of anticipation. For in either of the events aforesaid, I direct that my said nephew shall lose all benefit of this provision, and that no assignees, creditors, or other persons, shall derive any benefit therefrom, my object being for the personal wants of the said *Thomas Watkins* until any such event as aforesaid shall have happened, and then for the good of his family."

On the happening of any such event, the trustees were to stand possessed of the trust moneys and dividends, interest and annual produce thereof, in trust for all and every the lawful children of the testatrix's nephew, who, being a son, should attain twenty-one years, or daughters, should attain that age or marry. "But in case my said nephew shall not, on the happening of the said events before mentioned, have any lawful children or child, then, subject to a discretionary power in the trustees, to pay my nephew any sum or sums of money they may, in their sole discretion, think proper, I direct that the said trust moneys, stocks, funds, and securities, shall fall into, and be taken and considered as part of, my residuary personal estate; and I direct the same dividends, interest, and annual produce, to be paid by equal half-yearly payments, clear of all deductions except legacy duty and income-tax. The first payment thereof to begin and be made at the expiration of six calendar months after my decease, and a proportionate part thereof to begin and be made to the executors, administrators, and assigns of my said nephew, in the event of his dying before he shall have attained the age of twenty-five years, on any other day than is one of the half-yearly days of payment."

After directing the trustees to make up, from her personal estate, any deficiency of interest or annual proceeds at the rate of £5 per cent., which might be occasioned by the non-receipt, for some time after her death, from the assurance company, of the £1000, so that the first half-yearly payment might be made to commence from the time of her death, as thereinbefore directed, the testatrix directed the trustees to pay the proceeds of the policy of assurance to her nephew on his attaining twenty-five: in case he should die under twenty-five leaving any child or children him surviving, the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, were directed to remain and be in trust for all and every the children of her nephew, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age; if more than one, in equal shares as tenants in common, and if but one, the whole should be in trust for that one. The trustees were also authorized to raise or advance any part of the said trust moneys for the preferment, advancement, or benefit of her nephew, as they should think fit.

The testatrix died in September, 1852.

Thomas Adds Watkins, the nephew of the testatrix, died unmarried, and without having attained twenty-one, on the 20th of November, 1863. He never became bankrupt or insolvent, had not made any composition with his creditors, nor pledged his property for their benefit.

The bill was filed by the Plaintiff, as legal personal representative of *T. A. Watkins*, for the purpose of obtaining a declaration that the interest of *T. A. Watkins* in the proceeds of the policy for £1000 was a vested and transmissible interest, and that, in the events which had happened, the Plaintiff, as administrator, was entitled to have such proceeds, after deducting any sums properly paid or advanced for the benefit of the said *T. A. Watkins*, transferred to him at the time when *T. A. Watkins*, if he had lived, would have attained twenty-five, and to have the money properly secured in the meantime.

Mr. *Willcock*, Q.C., and Mr. *Charles Browne*, for the Plaintiff, contended that, in the events that had happened, *Thomas Adds*

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Watkins took a vested transmissible interest in the legacy of £1000. The whole scheme of the bequest (which was specific, and entirely severed and taken out from the rest of the testatrix's estate: *Saunders* v. *Vautier* (1)), was to create a trust, vesting the property immediately in trustees, entirely for the benefit of *T. A. Watkins* and his family, and there was no indication of any intention to benefit the residuary estate, as, in the only contingency in which the legacy fell into the residue, it was subject to the power given to the trustees to apply it, whether principal or interest, for the benefit of the nephew, in their discretion, even in the event of his doing that which was regarded as a forfeiture. The circumstance that the whole of the interest was not of necessity to be applied for maintenance, did not alter the principle: *Eccles* v. *Birkett* (2); *Harrison* v. *Grimwood* (3); *Hanson* v. *Graham* (4). The scheme of the will was to give the entire income to the legatee up to his attaining twenty-five, with a direction to pay the principal to him at that age; and this gift was liable, on a certain contingency, such as the bankruptcy or insolvency of the legatee, to a divesting clause, which applied to the principal as well as to the interest, while, upon another contingency (his death under twenty-five, leaving children), it was reduced to a life interest, not in derogation of the previous absolute gift, but in order to preserve for his children (in case he should have any, and die before the period when the principal was to be paid to him) that which was intended as a provision for him and his family.

In certain specified events there was a substituted trust, but unless that substituted trust came into operation, the original gift remained. Those specified events had not taken place, and, therefore, the interest originally given to the legatee remained unaffected.

Mr. *G. M. Giffard*, Q.C. (Mr. *E. K. Karslake* with him), on behalf of the residuary legatee, claimed the legacy, as having gone over by the death of *T. A. Watkins*, before he attained the specified age of twenty-five. The case was distinguished from *Saunders* v. *Vautier*, as there the whole income was included, and there was a

(1) Cr. & P. 240.
(2) 4 De G. & Sm. 105.
(3) 12 Beav. 192.
(4) 6 Ves. 239.

complete dedication of the fund, there being no provisions with reference to the income in that case which at all militated against the notion that the legatee was to take immediately. The cases of *Eccles* v. *Birkett* (1), and *Harrison* v. *Grimwood* (2), decided, that if there be a discretionary power, although the whole income may be given, this will be enough to bring the case within *Hanson* v. *Graham* (3); but these cases could not well be reconciled with *Leake* v. *Robinson* (4), and *Bull* v. *Pritchard* (5).

The very object and purpose of the testatrix in this case was, that the legatee should not enjoy the ordinary incidents of property, or have dominion over the subject matter, until a certain period, which was wholly inconsistent with the notion that the capital was to vest in him before that period. His attaining twenty-five was a condition precedent to vesting, and this was made evident by the provisions as to income, which were inapplicable to a person who was to take an immediate vested interest in the capital. The intention of the testatrix was clearly to give him the income by way of maintenance, but not to give him anything like property, or an absolute interest in it. Then, again, the direction that the first payment should be made six months after the death of the testatrix was inconsistent with there being an immediate vested interest, as if vested, whatever interest was produced by that specific legacy, would belong to the specific legatee as soon as the testatrix died.

Taking the gift of the capital by itself, it vested nothing until the legatee attained twenty-five, while the gift of the income was meant to be something totally distinct and different from the gift of the capital, and was not an absolute gift, but a gift of the income only, unless and until he should become bankrupt, &c., and in such a way that he should not be entitled to anticipate. There were no technical rules compelling the Court to disregard the intention of the testatrix, and that intention was plain and clear, viz., to postpone the period of vesting, or absolute dominion, until the legatee should have attained twenty-five.

(1) 4 De G. & Sm. 105.
(2) 12 Beav. 192.
(3) 6 Ves. 239.
(4) 2 Mer. 363.
(5) 1 Russ. 213.

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Mr. *Willcock*, in reply, referred to *Crickett* v. *Dolby* (1); *Davies* v. *Fisher* (2).

SIR W. PAGE WOOD, V.C.:—

It has been very ingeniously argued by Mr. *Willcock* in this case that the whole series of limitations may, without any forced construction of the words, be reduced to a gift of the income to the legatee, until he attains twenty-five, with a gift of the principal to him at that age (which, of course, in itself would vest the property at once), coupled with a clause divesting the whole gift of principal and interest in the event of his attempting to alienate the property; with a defeasance to take effect for the benefit of his children, if any, and if none, for his residuary legatee; subject also to another defeasance in the event of his dying under twenty-five, leaving children; in which case the defeasance is to be in favour of the children, but with no further limitations. If the will can be fairly so construed, then the limitations will be good, and effect ought to be given to them; the effect of which, in the events that have happened, will be to vest the property in *Thomas Watkins* absolutely. The limitations would, I say, upon such a construction, be perfectly good, as, although you cannot make a grant to a man of property, and, at the same time, deprive him of its incidents by saying that he shall not alienate it, yet a gift may be made by a third person, defeasible in the event of an attempt to alien, and that may be done even with a simple proviso that the interest shall thereupon cease, as well as by a gift over, as was determined in *Rochford* v. *Hackman* (3).

Upon careful consideration, I think that the will is open to that construction, and that the gift is vested subject to those defeasances, neither of which has taken effect. It might be important to see whether the whole gift is vested, interest as well as principal. I think it is so. If it had not been so, I should have had much more doubt upon the case. There is a clear and manifest intent that there shall be no power of alienation on the part of *Thomas Watkins* up to the age of twenty-five; that is to say, the moment he attempts to alienate between twenty-one and twenty-

(1) 3 Ves. 15, 16. (2) 5 Beav. 201.
(3) 9 Hare, 475.

five (there is no other period at which he could do so) there shall be a forfeiture. If I should be compelled to hold that such forfeiture would only apply to the income, and not to the principal, it would seem to be so contrary to the whole scheme and scope of the will, that the property should be vested *qua* principal, so as to enable him to dispose of the whole of that at twenty-one, in reversion upon his attaining twenty-five, though he was prohibited altogether from disposing of the interest, that I should be inclined to say that there was such a total gap separating the principal from the interest, as would, according to *Hanson* v. *Graham* (1), prevent the whole property becoming vested: the theory being that, where the principal is given at a distant epoch, and the whole income is given in the meantime, the Court, leaning in favour of vesting, has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the income from the principal, it is not vested. In this way I think some, though perhaps not all, of the cases may be reconciled where the income has been only partially given, that is to say, where a certain amount has been given to trustees for the purpose of maintenance, and not the whole income of the fund. In all cases, I apprehend, where ultimately, as in *Saunders* v. *Vautier* (2), the accumulated residue, whatever it may be, is to go to the same legatee, then the whole gift is vested. I should have had more doubt about those cases where the accumulations are not given, because there the whole reasoning in *Saunders* v. *Vautier* has failed, the two things are not connected, and the whole thing is not given. In this case the property is given to the two trustees, a circumstance always held to be favourable to vesting, and relied upon by Lord *Cottenham* in *Saunders* v. *Vautier*, following, as he did, *Love* v. *L'Estrange* (3), as shewing a separation of the legacy from the bulk of the testator's estate. It is more marked here, as one of the trustees is not an executor, so that it is taken wholly and clearly out of the estate of the testatrix, and is vested in them upon certain trusts.

[His Honour, after stating the words of the will terminating "for in either of the events aforesaid, I direct that my said nephew shall lose all benefit of this provision," continued:—]

Now, "this provision," it struck me at first, could only be applied

(1) 6 Ves. 239. (2) Cr. & P. 240. (3) 5 Bro. P. C. 59.

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to the income itself, but looking at the following words, "this provision" means, I think, the whole provision which she has made for him by the will, and for this reason, that she says: "that no assignees, &c., shall derive any benefit therefrom, my object being to provide for the personal wants of the said *Thomas Watkins* until any such event as aforesaid shall have happened, and then for the good of his family." Now, the whole is given over to the family, and therefore "this provision," I think, means the whole, so that the moment he attempts to alien any portion of the income, the whole legacy, principal and income, goes together, and the gift is defeated. Without any forcing of the words, and on the true and natural construction, there is a clause directing payment of the whole income (no question of partial income arises) until he attains twenty-five, subject to the parenthetical interposition that if he attempts to alien it, it is to go over. He is to have the whole income until twenty-five, and the whole principal at twenty-five; and, by the divesting clause, in the event of his attempting alienation, it is given over to the children, if he have any, or to the residuary personal estate, if he have none; and there is the subsequent divesting clause, which gives it over in the event of his dying under twenty-five leaving children. It appears to me that the clause which is, perhaps, the most difficult of the whole, by which he is to have a proportionate part in the event of his dying before he attains twenty-five, is reasonably and well answered by the gift over, if he died under that age, to the children. I strike nothing out of the will in coming to this conclusion, which is fortified by the circumstance relied upon in *Saunders* v. *Vautier* (1), that the whole thing is absolutely taken out of the testatrix's estate, subject only to the contingency of his alienating, and having no children, and taken out of the estate for what?—"for the personal wants of the said *T. A. Watkins*, until any such event as aforesaid shall have happened, and then for the good of his family;" the sole objects of the trust (except in the event of his alienating, and not leaving a family) being *Thomas Watkins* and his family. The circumstance that there is one event in which it is to go back to the residue helps the construction that, except in that event, it is not to go back to the residue, because, having given it over, in case

(1) Cr. & P. 240.

of alienation leaving children, she makes no such provision for the event of his dying not having children, and not having alienated. The question is one of some nicety, but I think the sound construction of the will is, that there is a gift to *Thomas Watkins* of the whole income, and of the whole principal at twenty-five, which carries the vesting immediately, subject to defeasance, in the events of his alienating any part, or dying under twenty-five and leaving children; and as neither of these events has occurred, the same continued a vested interest in *Thomas Adds Watkins*.

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Solicitors: Mr. *George A. James*; Mr. *F. W. Dolman*.

HAMILTON *v.* BUCKMASTER.

V.-C. W. 1866 *Nov.* 13, 14.

Will—Power of Sale in Executor—"Estate"—Specific Performance—Vendor and Purchaser.

A., after commencing his will with the statement that he thereby disposed of "all his worldly estate and effects in manner following," directed payment of his debts, &c., out of his personal estate, and that his executors should sell "all his stocks, shares, and securities, and such other part of his personal estate as was in its nature saleable, and collect and get in all money due and owing to him, and all other his estate, and convert the same into money and stand possessed of the proceeds upon trust to pay debts, funeral and testamentary expenses, and invest the residue thereof upon the trusts therein declared.

After the date of his will, *A.* became possessed of a freehold house.

This house was put up for sale by his executrix, who, in the absence of her co-executor (*A.*'s heir-at-law) in *India*, had alone proved the will:—

Held, in a suit for specific performance against the purchaser, that the executrix had power under the terms of the will, to sell the house; and that the expression of a contrary opinion by one of the conveyancing counsel of the Court was not sufficient to induce the Court to render the title unmarketable by refusing specific performance.

THIS was a suit for specific performance of a contract to purchase a ~~leasehold~~ freehold house, raising the question whether the executrix, who had entered into the contract, had power to sell under her testator's will.

Dr. *Charles Thomas Hamilton* by his will, dated the 29th March, 1845, which commenced with the following recital:—"Whereby I

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dispose of all my worldly estate and effects in manner following,"— directed all his just debts, funeral and testamentary expenses, to be paid and satisfied by his executors, out of his personal estate, as soon as conveniently might be after his decease, and a sufficient sum to be paid by his executors "out of his estate" for keeping his tomb in repair. After bequeathing to his wife a sum of £2758 12*s.* 4*d.*, settled on her in pursuance of her marriage settlement, and directing his executors, in case it should have been sold out, to purchase sufficient stock to make up the amount of his personal estate, testator directed his executors to make sale, and absolutely dispose of, all his stocks, shares, and securities, and such other part of his personal estate as was in its nature saleable, and to collect and get in all sum and sums of money due and owing to him, and all other his estate, and convert the same into money, and stand possessed of the proceeds upon trust, in the first place, to pay debts, and funeral and testamentary expenses, to invest the residue thereof, and stand possessed of the trust moneys upon the trusts therein declared (not material to be set forth, with this exception, that the testator spoke of it as his residuary estate). The will concluded by devising all messuages, lands, tenements, hereditaments, stocks, funds, and securities, which then were, or at the time of his decease might be, vested in him upon any trust, unto his executrix and executor, and the survivor of them, and the heirs, executors, administrators, and assigns, of such survivor, according to the nature and quality thereof respectively, upon trust to hold and dispose of such trust estates pursuant to the trusts thereof.

The testator died on the 3rd of May, 1865. At the time of his death he was possessed of a freehold messuage in *St. John's Wood*, which was acquired by him subsequently to the date of his will. This house was put up for sale by his executrix, who had alone proved the will, her co-executor *John James Hamilton*, who was the testator's heir-at-law, being at the time in *India*. At the sale by auction the Defendant was declared the purchaser, paid the deposit, and signed an agreement or payment of the remainder of the purchase-money.

An abstract of title having been sent, an objection was taken on behalf of the purchaser that the executrix had no power under Dr. *Hamilton's* will to sell this freehold property, and that, at all

events, the concurrence of the devisee (if any) or the heir-at-law should be procured.

John James Hamilton, the heir-at-law of the testator, and one of the executors appointed by the will, died on his passage home from *India*.

The purchaser (fortified by the opinion of Mr. *Dart*, one of the conveyancing counsel to the Court) having declined to complete, the present bill was filed by the executrix to enforce specific performance of the contract.

Mr. *G. M. Giffard*, Q.C., and Mr. *Eddis*, for the Plaintiff, contended that she had power to sell the testator's real estate. There was a clearly expressed intention on the face of the will to dispose of everything that the testator had, both real and personal, and the words used, "all my worldly estate," and again, "all other my estate," in marked distinction from his personal estate, were sufficient to carry the real estate: *Tilley* v. *Simpson* (1); *D'Almaine* v. *Moseley* (2); *O'Toole* v. *Browne* (3); *Doe* v. *Evans* (4); *Jarman* on Wills (5). Although there was no express gift of the legal estate to the executors, it was well settled that the legal estate would be held to pass under a direction for them to sell and convert the real estate: *Doe* d. *Greatrex* v. *Homfray* (6).

Mr. *Amphlett*, Q.C., (Mr. *Dart* with him), on behalf of the purchaser, contended that the question was not so entirely free from doubt as that the Court would force the title upon a purchaser in the absence of the heir-at-law, or persons claiming under him, who might hereafter come forward and assert their rights, and recover the property from the purchaser in possession, who would be left without remedy in such a case. Even if the heir-at-law were present and willing to be bound, the case was by no means clear upon the will. It was true that the testator had expressed his intention to dispose of all his property, but the mere expression of an intention not to die intestate, where the will omitted to dispose of real estate, would not prevent an intestacy in that respect, and the Courts had in two very recent cases declined to allow mere introduc-

(1) 2 T. R. 659, n.
(2) 1 Drew. 629. 17 Jur 872.
(3) 3 E. & B. 572. 18 Jur 1113.
(4) 9 Ad. & E. 719.
(5) Vol. i. p. 686, 3rd ed.
(6) 6 Ad. & E. 206.

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tory words to bear the extended meaning contended for by the Plaintiff: *Cook* v. *Jaggard* (1); *Lloyd* v. *Jackson* (2). Looking at the whole will, it was clear that the testator, who either did not know that he had any real estate, or had no disposing will over it, was dealing with personal estate only, and by construing "estate" throughout as personal estate the will was rendered entirely consistent. The absence of any direct gift to the executors took the case out of the authority of *D'Almaine* v. *Moseley* (3); and it was to be observed, from the devise of trust estates, that the testator knew how to devise real estates when he wished so to do: *Denn* v. *Gaskin* (4); *Doe* v. *Allen* (5).

Although the opinion of conveyancing counsel would not weigh with the Court if all parties were before it, yet it was of great importance upon a question of forcing a title upon a purchaser, as shewing that at least two independent minds might come to a different conclusion, and, as the Court had no means of finding the question as against adverse claimants or of indemnifying the purchaser, if its own opinion in favour of the title should turn out not to be well founded, it would not in so doubtful a case, in the absence of the heir-at-law, compel the Defendant to take the title: *Pyrke* v. *Waddingham* (6).

Mr. *Giffard*, in reply, submitted that it was not a case in which "a fair and reasonable doubt" could be entertained on the question, and that no title could ever be forced upon a purchaser, if not this one. The heir-at-law of the testator took no legal estate, and in any case he was dead, and it was doubtful whether the heir of such heir-at-law could be found.

[The VICE-CHANCELLOR referred to *Robinson* v. *Lowater* (7).]

SIR W. PAGE WOOD, V.C.:—

I confess I never had any doubt that under this will the executrix has power to sell the house in question, but the question

(1) Law Rep. 1 Ex. 125.
(2) Law Rep. 1 Q. B. 571.
(3) 1 Drew. 629. 17 Jur 872.
(4) Cowp. 657.
(5) 8 T. R. 497.
(6) 10 Hare, 1.
(7) 17 Beav. 592. 18 Jur 821.

that weighed with me was, how far such a title could be forced upon a purchaser. I agree that the will, beginning as it does, indicates an intention on the part of the testator to deal with all he had, both real and personal estate, and that this view is strengthened when you afterwards find the word "estate" used in such a way as you would expect if it referred to real estate; unless, of course, there are words shewing an intention, either directly or by necessary implication, to confine the meaning, and use the word in its narrower sense. I do not think there are any such narrowing words to be found in this case. The specific reference to personal estate still more strongly confirms the view that "estate" means everything, both real and personal. The testator has in effect formed a compound fund, and there is surely nothing inconsistent in saying that the executors should discharge the debts out of one of the component parts of that fund, nor is there anything in that clause to draw back or limit the word "estate" to personal estate. What the testator has done is to take out of the general description of "all my worldly estate and effects" his personal estate for certain specific purposes. With respect to the words "collect and get in," Vice-Chancellor *Kindersley*, in *D'Almaine* v. *Moseley* (1), held that these words afforded no sufficient indication that the testator did not intend to include real estate, especially when the very same words were applied to personal estate consisting of leaseholds, which clearly were intended to pass. It is difficult to see what words could have been more aptly used by the testator in a direction to his executors to collect, get in, and convert all his property, both real and personal; and the only substantial distinction between this case and *D'Almaine* v. *Moseley* is, that the words in this case are, if anything, rather stronger for including real estate. In *Cook* v. *Jaggard* (2) the contest was, whether the reversion in fee in certain copyholds passed under a residuary clause giving "all the rest, residue, and remainder of my personal estate and effects, wheresoever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease," but it is difficult to see how anyone could have entertained a doubt upon

(1) 1 Drew. 629. (2) Law Rep. 1 Ex. 125.

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the question. The case, which was there cited, of *Wilce* v. *Wilce* (1), where the gift was "as touching such worldly property, &c.," and lands not specifically devised were held to pass, is an important decision, and certainly very much stronger than the present case. I confess, therefore, that I cannot entertain any doubt upon the question.

With respect to enforcing specific performance against the purchaser, it has been contended that, having regard to the difference of opinion between the eminent counsel who have advised upon this title, there is such a reasonable doubt that I ought not to force the title upon the purchaser. But am I to make this estate unmarketable, for that will be the effect of refusing specific performance? If, in deciding in favour of the vendor, I am wrong, my decision can be set right by the Court of Appeal. But if I decide in favour of the purchaser, then I shall be condemning the title beyond the power of appeal, as the Court of Appeal has always held, that the simple expression of doubt in the Court below is sufficient to prevent the title from being forced upon a purchaser.

Solicitors: Messrs. *Rhodes, Son, & Duffett;* Messrs. *Miller & Son.*

V.-C. W. 1866 *Dec.* 12.

ALGER *v.* PARROTT.

Will—"Personal Representatives."

Testatrix directed the interest of £1000 stock to be paid to *D.* for life, and at *D.'s* decease directed the stock to be transferred to *D.'s* personal representatives:—

Held, that *D.* took an absolute interest.

4 Eq 366, 364

8 Eq 690.

THIS was a special case for the purpose of determining the construction of the following bequest contained in the will of *Frances Elizabeth Dayrell*, deceased. "I bequeath parts of my stock as follows, that is to say, £1000 stock, the interest whereof I direct to be paid to Mrs. *Catherine Buckeridge Dax*, for her life, and at her

(1) 7 Bing. 664.

decease the said last mentioned stock to be transferred to her personal representatives,"

Mrs. *Dax* having died, the Plaintiffs, who were her next of kin, claimed to be entitled under the above bequest, but their claim was resisted by the executors and legatees of the will of Mrs. *Dax*, who contended that Mrs. *Dax* took an absolute interest.

Mr. *Speed*, for the Plaintiffs, contended, that although strictly the words "personal representatives" meant "executors and administrators," yet these words had been held to mean next of kin in cases where the gift to the representatives was substitutional, as in *Bridge* v. *Abbot* (1); or alternative, as in *Cotton* v. *Cotton* (2); or where there was a gift to *A* for life, with a direction on *A's* decease to transfer to *A's* personal representatives, as in *Baines* v. *Ottey* (3); *Robinson* v. *Smith* (4); *Walter* v. *Makin* (5). He also referred to *Holloway* v. *Holloway* (6), and *Saberton* v. *Skeels* (7).

Mr. *Charles Hall* for the Defendants, contended that Mrs. *Dax* took an absolute interest. The primary meaning of personal representatives was executors and administrators, and when, in a bequest, a different construction was put upon the words, it was because something in the context was repugnant to such primary meaning. In *Baines* v. *Ottey* words were found indicating a tenancy in common; in *Walter* v. *Makin* words had been used in different senses in different places, and *Robinson* v. *Smith* turned on a desire to exclude the husband of the tenant for life. The present will contained nothing to vary or control the primary meaning, which must therefore prevail: *In re Crawford* (8); *In re Turner* (9); *King* v. *Cleaveland* (10); *In re Wyndham's Trusts* (11).

Mr. *Speed* in reply, said, that as the word "executor" had been used in the will, in a manner shewing that the testatrix knew the meaning of the word; she must therefore have meant something different by the words "personal representative."

(1) 3 Bro. C. C. 224.
(2) 2 Beav. 67.
(3) 1 My. & K. 465.
(4) 6 Sim. 47.
(5) Ibid. 148.
(6) 5 Ves. 399.
(7) 1 Russ. & My. 587.
(8) 2 Drew. 230.
(9) 2 Dr. & Sm. 501.
(10) 4 De G. & J. 477, 4 Jur. N. S. 1044; 26 Beav. 166
(11) Law Rep. 1 Eq. 290.

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SIR W. PAGE WOOD, V.C.—

Words having a distinct meaning must bear their primary legal import. I cannot assume a supposed intention of the testatrix contrary to what she says, in the absence of other words to control the meaning of what she says, though of course where, as in some of the cases cited, there are words indicating such intention, effect will be given to them. There is nothing in this will to authorize me to say that this direction to pay the income to *A* for life, and after her decease to pay the fund to her personal representatives, means anything beyond the primary meaning of the words. It is certainly a round about way of expressing an absolute gift. But it primarily means such a gift, and there is nothing in the will to contradict it. There are no directions to divide equally, which might have induced the Court to put another interpretation upon the bequest, as in some of the cases cited, but, on the contrary, although the testatrix has used words of division in other bequests, she has not done so in this one.

I must therefore hold that Mrs. *Dax* took an absolute interest.

Solicitor: Mr. *Alger*.

V.-C. W. 1866 *Nov.* 13, 14, 23.

SENIOR *v.* PAWSON.

Ancient Lights—Obstruction—Damages—Delay—Negotiation—Cairns' Act.

In a case where the circumstances justified the Court in granting a mandatory injunction at the hearing, to compel the Defendants to pull down newly-erected buildings to the height of the former ones, on the ground of obstruction to the Plaintiff's light and air; but where the Plaintiff, having heard of the intended structure in April, did not complain till the November following, during which time the Defendants had laid out large sums; and where the Plaintiff had also, since bill filed, made an offer to take a money compensation for the injury to her rights:

The Court, instead of an injunction, directed an inquiry as to the amount of damages sustained by the Plaintiff.

THIS was a motion for decree.

The bill was filed by Mrs. *Sarah Ann Senior*, widow, the owner and occupier of a freehold public-house, called the *Mulberry Tavern*, in *Mulberry Street, Sheffield*, to restrain the Defendants,

Henry Pawson and *Joseph Brailsford*, from erecting upon their premises in *Mulberry Street*, "any buildings whereby the access of light to the ancient windows of the Plaintiff's messuage, as hitherto enjoyed, might be obstructed."

The Plaintiff's house was thirty-one feet high, and had a frontage to the street of thirty-six feet.

In March, 1865, the Defendants had purchased property opposite to the Plaintiff's house, on the other side of the street (which was only sixteen feet wide), consisting of a building, wall, and gateway. The frontage to the street altogether was about forty feet long; the building fronted sixteen feet, and was about twenty-three feet four inches to the square of the roof, and seven feet higher to the ridge. The wall and gateway fronted about twenty-four feet, and varied in height from eight to sixteen feet.

The purchase having been completed in May, the Defendants, in June, began to pull down the premises, with a view of erecting an extensive and lofty building, to be used as printing offices. On the other hand they had set back the line of the old buildings five feet, so as to widen *Mulberry Street* opposite the Plaintiff's house from sixteen to twenty-one feet.

The Plaintiff, through her solicitor, applied to the Defendants, on the 14th of November, threatening legal proceedings to prevent the buildings being carried higher than the old ones, to which the Defendants' solicitors replied on the 1st of December, offering to show their clients' plans, and also offering to purchase Mrs. *Senior's* property for the purchase-money paid by her husband, and any costs incurred since in improvements. This offer, it appeared, came from "The *Sheffield Club*," which had purchased property adjoining the Plaintiff's, on the same side of the street. The Plaintiff's solicitor wrote on her behalf declining it.

The plans were shewn and inspected on the 2nd of December, from which it appeared that the proposed height of the Defendants' new offices was fifty feet to the square, and ten feet more to the ridge of the roof.

The bill was filed on the 5th of December, 1865; stating that the buildings had not at that date been raised higher than the third story, and no serious obstruction had been occasioned; and an injunction was moved for, but before it could be heard, the

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Defendants, having hurried on their building, had completed it in part to the full height; and the motion was ordered to stand over to the hearing, the Vice-Chancellor observing, that everything which the Defendants had done since the filing of the bill they had done at their own peril.

From the Defendant *Pawson's* evidence, it appeared that early in April, 1865, Mrs. *Senior* was informed by him that the Defendants were about to build new printing offices on the site of their "back property;" and that about that time he was almost daily on the premises, and the Plaintiff, though she frequently saw him, made no objection at that time to the Defendants' proceedings.

On the 17th of April, 1866, notice of motion for decree was given, and further affidavits were filed by the Plaintiff, from which it appeared that the Defendants had then completed their buildings, and the effect was, that the Plaintiff was obliged to keep gas burning all day near the taps in the bar of the tavern; and had to light up the bar, and the other rooms in the front of the street, from two to three hours earlier in the afternoon than formerly. It was also stated that the house, which had a southern aspect, now had sunshine for only about ten minutes each day, instead of from seven to eight hours as formerly. A corn-dealer, who was in the habit of frequenting the house, deposed that it was no longer possible to show samples of corn in the house to customers, as he used to do; and a miller, a purchaser of corn, stated to the same effect.

From an affidavit of one of the Defendants' solicitors, filed on the 4th of June, it further appeared that on the 26th of March they wrote to the Plaintiff's solicitor, rejecting, on behalf of their clients, a proposition which had been offered on Mrs. *Senior's* behalf; which was, that they should purchase her property at £1300, grant her a lease at £65 a year, and at the end of the term buy her stock and fixtures up to £400.

Mr. *G. M. Giffard*, Q.C., and Mr. *Rodwell*, for the Plaintiff:—

The facts of this case are stronger than those in *Yates* v. *Jack* (1).

(1) Law Rep. 1 Ch. 295.

After having notice of the suit, the Defendants went on building; and the Court said that they would do so at their peril.

Mr. *W. M. James*, Q.C., and Mr. *C. C. Barber*, for the Defendants:—

The Plaintiff was informed of these proceedings early in April, but she waited till November, before she made any complaint; thus allowing the Defendants to lay out money on a plan prepared on the faith of her acquiescence.

Moreover she had herself made an offer to take money by way of compensation: *Dent* v. *Auction Mart Company* (1).

At the time when the bill was filed, there was no ground for equitable interference; and in such a case the Court will leave the question of damages to a Court of law: *Durell* v. *Pritchard* (2).

Mr. *Giffard*, in reply.

SIR W. PAGE WOOD, V.C.:—

In this case, I shall reserve my judgment upon the question of whether or not this is a case in which damages should be awarded under *Sir H. Cairns' Act.*

If this were a case not within the jurisdiction of the Court, of course I should not award damages. But here I have a state of circumstances very much stronger than that which occurred in *Yates* v. *Jack* (3), in which Lord Chancellor *Cranworth* said, "*Res ipsa loquitur.*" Very little evidence is wanted to shew me that the Plaintiff would materially suffer if the Defendants' buildings were allowed to remain at this height. There is evidence to shew that an enormous quantity of sky surface has been obliterated, and that it is necessary now to burn gas all day, when it was not burned before in the daytime. The answer to that has been: "You are burning gas only to make a case;" and there may be some force in this; but besides that, there is the evidence of a corndealer, who says he used to come to this house to sell corn by sample, and that now it is no longer possible to do so; and a buyer says

(1) Law Rep. 2 Eq. 238, 246. (2) Law Rep. 1 Ch. 244, 251.
(3) Law Rep. 1 Ch. 295.

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the same thing. The inconvenience of the Plaintiff's customers is her inconvenience; her trade cannot be carried on so conveniently. The excuse has been the old and stale one: "We have given you more light in another way," namely, by widening the street; and further, "your property has been improved by the neighbourhood of a club." But these are not reasons why the Plaintiff should suffer from a building being erected opposite to her house, in obstruction of her light and air. Upon this branch of the case I have had no difficulty; the main question being, whether the dimensions and situation of the new buildings are such as to shew that real injury has been done. Upon that I feel no doubt at all, and therefore, relief in some form must be given.

The only part of the case upon which I have felt some doubt is, as to the degree of mischief which would now be occasioned by a mandatory injunction, and as to the time that elapsed before an application was made to this Court. I have no doubt as to the jurisdiction of the Court to order the buildings to be pulled down, but I question whether it would not be expedient to give relief in damages, under *Sir H. Cairns' Act*. I will consider the point, and mention it again.

Nov. 23. SIR W. PAGE WOOD, V.C. (after stating the point):—

I have always felt great hesitation, hitherto, in granting relief, by way of compensation in damages, in questions of this kind. It is only in very exceptional cases indeed, that Defendants, who have erected buildings of this description, obstructing the light and air enjoyed by other people, will be considered as entitled, as it were, to a compulsory sale of a Plaintiff's property without any Act analogous to the *Lands Clauses Consolidation Act*, under which damages can be properly ascertained by means of a jury, and thus become purchasers of property to which otherwise they would have no right. But, after giving a good deal of consideration to this case, I think there are two grounds for excepting it from the general rule which I should be disposed to apply to suits of this class. In two cases only—one heard by Lord *Westbury*, of *Isenberg* v. *East India House Estate Company* (1), the other decided by Vice-

(1) 33 L. J. (Ch.) 392; 10 Jur. (N.S.) 221; 12 W. R. 450.

3 Jeff. & S. 268.

Chancellor *Kindersley: The Curriers Company* v. *Corbett* (1)—have damages been given instead of relief by way of injunction; and the case before the Vice-Chancellor is not a precedent, because a mandatory injunction was not asked for, or if asked for during the argument, was given up, and it seemed to be admitted that damages would be a sufficient remedy. Vice-Chancellor *Kindersley* accordingly gave relief in the form of damages.

In the present case there are, I repeat, two points which lead me to think that the same remedy will do substantial justice between the parties. In the first place it has been shewn, that a considerable time before the filing of the bill, the Plaintiff had notice of Defendants' intention to build, and to build evidently, also, on a large scale. I do not think that on this account the Plaintiff is disentitled to come to the Court for an injunction, for it is not competent to the Defendants to say "Our plans were open to the Plaintiff's inspection." If their plans were prepared they should have volunteered to shew them to the Plaintiff, in order to fix her with acquiescence. Nevertheless the point is not one to be lost sight of when the Court comes to consider the reasonable means of doing justice between the parties.

A considerable sum of money has no doubt been expended by the Defendants upon this building: but the point which weighs most with the Court is this: that there has been a good deal of negotiation between the parties in respect of compensation by way of damages. A specific sum was in fact named, the offer being made without prejudice; and no doubt it ought to be so considered, for if an inquiry comes before me, I shall not consider the Plaintiff bound by any sum which she has said she was ready, for the sake of peace, to accept. But the question whether a money compensation will not do substantial justice here is considerably affected by the Plaintiff's readiness to accept a money compensation —and one, also, not of that vast amount which would in fact be equivalent to saying, "I will accept none but my own terms." This was one of the circumstances which I had to consider in the case of *Dent* v. *The Auction Mart Company* (2), in which Mr. *Dent* offered to take £2000. The case would wear a different aspect if one felt that a Plaintiff was saying, "My property has sustained

(1) 2 Dr. & Sm. 355. (2) Law Rep. 2 Eq. 238, 246.

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such and such injury. I am standing out for terms. If you will give me a handsome sum I will go, or let the matter drop. Otherwise I will not."

In determining, then, the remedy to be given by the Court, the circumstance that she has offered to take a money compensation, and one not of a very large amount, is of importance, as is also the circumstance that damage to a much larger amount would be done by granting this mandatory injunction. I do not think I ought to make a decree which would enable an extortionate price to be obtained for the injury sustained by the Plaintiff. Seeing the time which has elapsed before any complaint was made, seeing also that the reasonable mode of doing justice between the parties is by a money compensation, I think that in fairness and in principle the power of the Court should be so exercised as to give relief by damages instead of by injunction.

The form of the decree will be this: Declare that the Defendants, having caused damage and injury to the Plaintiff by the obstruction occasioned by their buildings, and having interfered with the access of air and light to the ancient windows of the Plaintiff's house, called the *Mulberry Tavern*, at *Sheffield*, an inquiry ought to be made what amount of compensation should be paid to the Plaintiff in respect of that damage and injury. Let inquiry be made accordingly what proper sum should be paid to the Plaintiff in compensation, such sum to be certified by the Chief Clerk, and to be paid to the Plaintiff within one month from the date of his certificate. The Defendant to pay the costs; with liberty to apply.

Solicitor for the Plaintiff: Mr. *Charles J. Gratton*, agent for Mr. *William Unwin, Sheffield.*

Solicitors for the Defendants: Messrs. *Dobinson & Geare*, agents for Messrs. *W. & B. Wake, Sheffield.*

In re AGRA AND MASTERMAN'S BANK.

V.-C. W.
1866
Nov. 15.

ANDERSON'S CASE.

Winding-up—Companies Act, 1862—*Set-Off*.

A. being under liability to a bank upon his acceptance, to fall due in July, 1866, took, in the ordinary course of business, an acceptance of the bank. This acceptance fell due and was dishonoured on the 10th of June, and on the 23rd of June an order was made for winding-up the bank, *A's* acceptance having matured in the hands of the official liquidator :—

Held, that *A.*'s right of set-off was not interfered with by the winding-up order.

THIS was a motion on behalf of *Alexander Dunlop Anderson* for the purpose of restraining the official liquidator of *Agra and Masterman's Bank, Limited*, from enforcing payment, under the winding-up, of a bill of exchange for £1565, accepted by *Anderson*, who claimed a right of set-off in respect of a bill of exchange for £1500, held by him, which had been accepted by the company and dishonoured at maturity: the balance of £65 having been paid by him to the official liquidator pursuant to an order dated the 30th of July (when the motion was first brought on), by which order Mr. *Anderson* was directed to give security for £1500, as the condition of obtaining possession of the goods which formed the security for payment of the bill of £1565 accepted by him.

Mr. *Anderson*, of the *Liverpool* firm of *Thompson, Anderson & Co.*, was in the habit of accepting bills drawn upon him by his *Calcutta* correspondents, and by them negotiated with the bank. As a security for the payment of these bills at maturity, the bills of lading for goods shipped by the *Calcutta* house, and consigned to *Thompson, Anderson, & Co.*, were deposited with the bank, who had power to sell the goods in the event of non-acceptance or non-payment of the bill of exchange. One of these bills for £1565 fell due on the 25th of July, 1866, and bills of lading for a cargo of jute and rice had been deposited with the bank as a security for its payment. On the 23rd of June, 1866, an order was made for winding-up the bank. At this time *Anderson* held an overdue acceptance of the bank for £1500 upon a bill of ex-

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change drawn upon and accepted by them, and given to him by his *Calcutta* correspondents on account of moneys then owing to him. This bill, which fell due on the 10th of June, 1866, had been dishonoured.

Certain other acceptances of *Anderson*, for £1245, £2500, and £775, in the possession of the bank at the time of making the winding-up order, had been paid by him, upon which the bills of lading by which those acceptances were secured were handed to him by the official liquidator. With respect to the acceptance for £1565 he claimed set-off, and had tendered £65, demanding at the same time the bills of lading for the jute and rice thereby secured. The official liquidator insisted upon his right on behalf of the company to sell the goods unless the acceptance were paid in full.

Under these circumstances, *Anderson* moved on the 30th of July for an injunction to restrain the official liquidator from selling the jute and rice, and from enforcing payment of the bill of exchange for £1565. The discussion upon the question of set-off was then postponed, and the order made was, that upon payment of the balance of £65 to the official liquidator, and upon security being given for £1500, the liquidator should give up the goods.

The motion was now renewed.

Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*, for *Anderson*, contended that he was entitled to set-off the dishonoured acceptance of the bank against the balance due upon his own acceptance. If the company had sued *Anderson* upon his acceptance, and *Anderson* after paying £65 into Court had pleaded set-off as to the balance of £1500, this would have been a good legal plea to the action. If proceedings had been taken by him in equity, then an account would have been directed, and *Anderson* would in taking such account be allowed the amount of the dishonoured acceptance of the company held by him; the rule being that when cross demands existed (which if both were recoverable at law would be the subject of set-off), if equity had jurisdiction of the subject matter set-off would be enforced: *Clark* v. *Cort* (1); *Courtenay* v. *Wil-*

(1) Cr. & Ph. 154.

liams (1); *Freeman* v. *Lomas* (2). The present proceeding was in the nature of a redemption suit, and the rights of a mortgagor in respect of set-off must be the same whether he is Plaintiff in a redemption suit or Defendant in a foreclosure suit: *Watts* v. *Symes* (3). This right of set-off was in no way affected by the winding-up order, the only provision on the subject in the *Companies Act*, 1862, being one (sect. 101), which only referred to claims by members of an unlimited company in respect of any independent dealing or contract with the company. [They also cited *The Alliance Bank* v. *Holford* (4).]

Mr. *Roxburgh* (the *Attorney-General*, Sir *John Rolt*, with him), on behalf of the official liquidator:—

The principles established in the cases cited on the other side are not disputed, but they have no application to cross demands against a company over which a winding-up order has been made. That order is in the nature of a decree for the general administration of the estate of the company, for the benefit not only of the contributories, but also of creditors. If the right of set-off here claimed is allowed, persons indebted to a company will have nothing to do but to go about and buy up acceptances of the company which is unable to meet them, and then claim to set-off the amount of such acceptances against their own debts, to the prejudice of the general body of creditors. The absence of any provision in the Act of 1862, leads to the inference that it was not intended by the Legislature to allow any set-off to be claimed against a limited company which was being wound up.

Sir W. Page Wood, V.C.:—

I think the question is to be determined in favour of the applicant on this ground. The Legislature has carefully and purposely avoided treating the case of a winding-up as a case in bankruptcy. The position of the parties is wholly different, and although all the property of a company being wound up is vested in the official liquidator, its position as to suits and actions is kept unaltered, and it may be dealt with just as if no stoppage had

(1) 3 Hare, 539.
(2) 9 Hare, 109.
(3) 1 D. M. & G. 240.
(4) 16 C. B. (N. S.) 460.

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occurred and no liquidation were in progress. That being so, I see nothing to interfere with the ordinary rights of the parties in cases of this description. At common law there would be nothing to prevent the liquidator from selling the goods, and dealing with them as he thought fit. Suppose he had sold the goods and no action had been brought, no set-off would have arisen. The applicant, however, coming into equity for the purpose of redeeming his security, is allowed to do so on the terms of having an account taken of what is due from the one party to the other. The right of set-off in such a case being admitted, it will not, I apprehend, be interfered with by anything that has taken place under the winding-up. This must have been under the consideration of the Legislature at the time of passing the winding-up Acts, as there is no provision analogous to that in bankruptcy; which seems to recognise the fact that a set-off should be allowed to a greater extent than where assets are being administered under bankruptcy. In the absence, therefore, of any express enactment, explaining or altering the rights as they would ordinarily exist between debtor and creditor if the company had been going on and in a solvent state, I must regard the case exactly as if no winding-up order had been made, and as if the parties stood in the ordinary position of debtor and creditor. In such a case it was, I think, very reasonably conceded by Mr. *Roxburgh*, that Mr. *Anderson* would have been entitled to have come here, and have stayed the sale of the goods in order to have the set-off allowed on tendering the amount due upon the balance of the two items. It has been suggested, that persons who are indebted to the concern might buy up acceptances of the company, and thus, by getting those acceptances paid in full, discharge themselves from liability; all I can say is, that if that is a difficulty the Legislature has made no provision for meeting it. If a case had actually occurred of persons going about and buying up debts at under-values, different considerations might perhaps arise. But the mere circumstance of taking bills of exchange in the ordinary course of dealing is not a circumstance which would induce this Court to say that the rights of the parties should be interfered with. To put it in the simplest form: suppose it was a case of no security. I find

nothing in the winding-up Act which would authorize me to say, that a debtor to the concern, taking in the ordinary course of business bills which are due from the concern and current in the market, should not be allowed to set off the one claim against the other. It appears to me, therefore, that Mr. *Anderson* is entitled to have his bond cancelled upon delivering up the bill of exchange. The costs of Mr. *Anderson*, and of the official liquidator, will be allowed out of the estate.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Thomas & Hollams*; Messrs. *Uptons, Johnson, & Upton.*

In re ENGLISH JOINT STOCK BANK. *Ex parte* HARDING.

Company—Winding-up—Servant—Salary—Notice of Discharge.

Although where the business of a company is wholly at an end, a winding-up order may be notice of discharge to the servants of the company from the date of the order; yet where the business is continued after the winding-up, and the former servants are actually employed, the old contract between the company and its servants continues in force, and notice of discharge must be given pursuant thereto.

THIS was a summons by Mr. *Harding*, who was one of the clerks of the *English Joint Stock Bank Limited*, that the official liquidator might be ordered to pay to him £50, in lieu of three months' notice of discharge.

The agreement between Mr. *Harding* and the company was, that he should serve in his capacity of clerk until his services should be determined by three months' notice on either side, the salary being £200 a year, payable quarterly. On the 27th of May, a compulsory winding-up order was made, and a liquidator appointed. Proceedings under this order were subsequently stayed, and an order for winding up under supervision made on the 31st of July; the liquidator being continued.

Mr. *Harding's* quarter's salary, up to the 24th of June, was paid. On the 1st of August he received a letter from the liquidator,

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giving him notice that his engagement was at end, and asking him to send particulars of his claim. To this he sent an answer, claiming £16 13*s.* 4*d.* for his apportioned salary for one month, to the 1st of August, and £50 instead of three months' notice; making £66 13*s.* 4*d.* together.

The official liquidator thought he could not pay the £50 without the opinion of the Court, having regard to the decision of the Master of the Rolls in *Chapman's Case* (1). This summons was accordingly taken out.

Mr. *Speed*, for the applicant:—

From the report of *Chapman's Case*, it does not appear that there was any express contract between the company and the clerk, in that instance.

The compulsory winding-up order has been superseded.

Mr. *Lindley*, for the official liquidator:—

The only question is, whether the decision of the Master of the Rolls does not govern the point. If the rule be, that a compulsory order is a notice of discharge, there was a notice of discharge on the 27th of May. The liquidator has no option given to him by the Act.

SIR W. PAGE WOOD, V.C.:—

I do not see enough in the case before me, as compared with that before the Master of the Rolls, to justify me in coming to the conclusion at which his Lordship arrived in that instance. If the services of a person in the employ of a company be not wanted—if the concern be hopelessly and irretrievably bankrupt, and there be nothing whatever for clerks to do—I can well understand that if the clerks receive notice at, or shortly after, the making of the winding-up order, that their services will be no longer required, their discharge may be held to date from the winding-up order; but if the company be a continuing company (and it is to be observed that the appointment of an official liquidator does not destroy a company—the official liquidator is, in effect, the com-

(1) Law Rep. 1 Eq. 346. 12 Jur NS 44. 35 Beav

pany), and there be actual business to occupy the services of clerks —they must then, I think, go on under the old contract.

There is sufficient, I think, in this case, to take it out of the decision of the Master of the Rolls, and I must allow this application, with costs out of the estate. The official liquidator will have his costs.

V.-C. W. 1867 *In re* English Joint Stock Bank. *Ex parte* Harding.

Solicitors: Mr. *Sismey*; Messrs. *Lawrance, Plews, & Boyer.*

ARMITAGE *v.* ARMITAGE.

V.-C. W. 1866 *Nov.* 24; *Dec.* 6.

Marriage, Presumption of—Laws and Customs of an uncivilized Community—Insufficient Evidence.

Property was bequeathed to the children of *J. A.*, provided he should marry an English lady. *J. A.*, in 1859, married a woman named *Hannah Tuhi Tuhi*, one of the offspring of an alleged marriage between a British subject and a native woman of *New Zealand* named *Tuhi Tuhi*. The only evidence of the marriage was that of the alleged husband himself, who said that he was a British subject, born abroad, in 1801, of British parents. He further said that he came to reside in *New Zealand* in or about 1828, and had resided there ever since; that in 1829 he intermarried with *Tuhi Tuhi*, and that such marriage was solemnized at a place in *New Zealand*, according to the laws, customs, and usages then in force in *New Zealand;* that *New Zealand* was not then a British colony, and there was not then a minister of any Christian church, nor any register of marriages in the island, and that from and after the marriage *Tuhi Tuhi* had lived and still lived with him as his wife.

The deponent did not state the names of his parents. He said that *Hannah*, before her marriage, was called *Tuhi Tuhi*, and not by her father's name, in conformity with the customs of the natives of *New Zealand;* but there was no evidence as to what the laws and customs of the natives of *New Zealand* were:—

Held, that the evidence was insufficient to enable the Court to presume a marriage.

JOSEPH ARMITAGE, who died on the 17th of August, 1860, by his will, dated the 28th of July, 1859, gave real and personal estate to four persons, and their heirs, executors, administrators, and assigns upon trust to permit and suffer his sixth son, *James Armitage*, to receive and take the rents and profits of the said premises during his life, and immediately after his decease to stand seised and

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possessed of the same premises for all and every, or such one or more, exclusively of the other or others, of the child, or children, and remoter issue born in wedlock, of his son, the said *James Armitage, provided he should marry an English lady, or one approved of by his* (the testator's) *trustees, not being a New Zealand native,* in such proportions, manner, and form, as he should by deed or will appoint; and in default of such appointment, and so far as the same should not extend, upon trust for all and every the children of the said *James Armitage,* to be divided between them, if more than one, in equal shares as tenants in common, or the whole to one only child, as the case might be; and for default of such issue, upon trust over.

James Armitage, on the 17th of May, 1859, was married, according to the rites of the Church of *England,* at *Taupiri* church, *Waikato, Auckland, New Zealand,* to *Hannah Tuhi Tuhi,* now living. He died on the 7th day of September, 1863, without having exercised the power of appointment, leaving several children, the present Plaintiffs.

Hannah Tuhi Tuhi was one of the children of an alleged marriage between *Samuel Randall* with *Tuhi Tuhi,* an aboriginal native woman of *New Zealand;* and the only evidence of the marriage was an affidavit, sworn the 8th day of May, 1866, by *Samuel Randall* himself, described as of *Rangiriri, Waikato, Auckland, New Zealand,* who deposed as follows:—"I am now sixty-five years of age. I am a British subject, and was born at *Rogerstown,* in the State of *Massachusetts,* on or about the 7th day of March, 1801, of British parents. I first came to reside in *New Zealand,* aforesaid, in or about the year 1828, and have resided continuously in the said province ever since. In the year 1829, I intermarried with *Tuhi Tuhi,* in the said bill mentioned, an aboriginal native woman of the said province. Such marriage was solemnized between me and the said *Tuhi Tuhi,* at *Rawhia,* according to the laws, customs, and usages, then in force in *New Zealand* aforesaid. *New Zealand* was not then a British colony, and there was not then, to the best of my knowledge information and belief, any clergyman of the Established Church of *England,* or of any other Christian church, resident in the said island. There was no register of marriages in the said island at that time, and there

is no register of the said marriage. From and after the time of such marriage, the said *Tuhi Tuhi* lived, and still lives, with me as my wife. *Hannah Tuhi Tuhi* was one of the children of the said marriage between me and the said *Tuhi Tuhi*. The said *Hannah Tuhi Tuhi* was born in the year 1837, and was baptized by the name of *Hannah*. So far as I know, there was no register of births in the said island at the time of the birth of the said *Hannah;* and there was no register of baptisms in the said island at the time of the baptism of the said *Hannah*; and there is, in fact, no register of such birth or of such baptism. The reason she was called *Hannah Tuhi Tuhi* before her marriage, hereinafter mentioned, and not *Hannah Randall*, was, that, amongst the natives, female half-castes are called by the name of their mother, in addition to their own Christian name."

Inquiries had been directed in Chambers, first, as to whether *Samuel Randall* was a British subject; and, secondly, whether *Samuel Randall* and *Tuhi Tuhi* were legally married: and the Court was now asked, upon summons adjourned from Chambers, to hold, upon the above evidence, that *James Armitage's* wife was "an English lady."

Mr. *G. M. Giffard*, Q.C., and Mr. *Nalder*, for the Plaintiffs, the children of *James Armitage*:—

The affidavit is sufficient, for the purposes of this suit, to prove a marriage between *Randall* and *Tuhi Tuhi*. It is sufficiently precise to enable an indictment for perjury to be founded on it if it should turn out to be false. *Randall* swears he is a British subject, and gives the reason, namely, that he was born of British parents, though out of the jurisdiction. He deposes to the marriage; hence the law will presume in its favour according to the maxim, *Omnia præsumuntur pro matrimonio;* and the presumption is supported by the subsequent cohabitation and birth of children.

In *Piers* v. *Piers* (1), a marriage in the *Isle of Man*, where the bishop's license is essential to the validity of a marriage, was upheld, after the lapse of a number of years, notwithstanding the oath of the bishop that he had never given the license. In a barbarous country, any contract of marriage, *per verba de præsenti*,

(1) 2 H. L. C. 331.

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will be upheld. Such a contract would have been upheld even in this country before the *Marriage Act: Rex* v. *Inhabitants of Brampton* (1). In that case, the Court held it unnecessary to inquire into the form and ceremony of the marriage, there being evidence of the fact of a marriage, followed by cohabitation.

If the affidavit be held sufficient, it follows that the daughter of *Samuel Randall* was "an English lady," and thus, that the condition of the gift has been fulfilled.

Mr. *Buchanan*, for the trustees.

Mr. *Yool*, for the persons interested in the event of the marriage turning out invalid:—

The defect of the affidavit is, that there is no evidence before the Court as to what the laws, customs, and usages of marriage then in force in *New Zealand* were. If polygamy was the usage of natives of *New Zealand* at that time, there is distinct authority to shew that a marriage celebrated in a country where polygamy is permitted by law, will not be treated as valid by an English Court of law: *Hyde* v. *Hyde and Woodmansee* (2).

Mr. *Giffard*, in reply:—

The Court cannot say that polygamy was the custom of *New Zealand* in the year 1829. There is no suggestion here that *Randall* ever took a second wife.

SIR W. PAGE WOOD, V.C., after stating how the question arose, continued:—

There are two defects in this affidavit. The first inquiry is, whether *Samuel Randall* himself was a British subject; for if he be not, his daughter, being a native of *New Zealand*, cannot be an English lady. All *Samuel Randall* says is, that he was born in *Massachusetts*, of British parents; but he does not state the name of either of his parents. That is not sufficient evidence that *Samuel Randall* is an Englishman.

The second inquiry, as to the validity of the marriage, is a very

(1) 10 East, 282, 288.

(2) Law Rep. 1 P. & D. 130.

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interesting one; but the Court cannot act on the present evidence. *Randall* says he went to *New Zealand* before it was a colony, that there was no one in orders there, and that he was married according to the customs and usages then in force in *New Zealand*. If these facts had been established, the question would arise, how far the principles laid down by Lord *Stowell* in *Ruding* v. *Smith* (1) would apply; and whether this was not a marriage entitled to the privileges of necessity. But the difficulty is, that the man's evidence is wholly uncorroborated, and that the daughter, before her marriage, did not bear her reputed father's name: and though that is met by appealing to the customs and usages of *New Zealand*, there is no evidence before the Court of what those customs or usages were. The inquiries must be referred back to Chambers, for further evidence.

Solicitors: Mr. *H. B. Clarke*, agent for Messrs. *Jones & Hird, Huddersfield;* Messrs. *Lever & Son*, agents for *Laycock & Dyson, Huddersfield.*

GRANT *v.* BRIDGER.

V.-C. W.
1866
Dec. 15, 18.

Will—Subsequent Conveyance—Revocation—Undivided Rights of Pasturage—Conveyance in Exchange for Land.

A testatrix, entitled with others to rights of pasture over certain lands, by will, before the *Wills Act*, devised the estate in respect of which her rights of pasture were held. Afterwards, in 1805, she joined with her co-owners of the rights of pasture, and with the owners of the lands over which they extended, in granting the rights and the lands to trustees upon trust to allot and convey the lands amongst the several grantors, and also to make and repair roads, drains, bridges, &c. In 1807 the trustees re-conveyed to the testatrix a portion of the lands in lieu of her rights, by a deed to which she was made a party. She died before the execution of the deed:—

Held, that the conveyance in 1805 operated as a revocation of the devise.

Observations on *Lock* v. *Foote* (2).

THIS was an adjourned hearing of the cause from Chambers on a question arising in prosecution of the order on further consideration, dated the 21st of April, 1866, directing inquiries whether

(1) 2 Hagg. Cons. Rep. 371. (2) 5 Sim. 618.

V.-C. W. 1866 GRANT v. BRIDGER.

William Milton Bridger, the testator in the cause, was in his lifetime possessed of any real estate at *Flansham, Sussex*, and if of any, for what estate and interest.

Mrs. *Ann Milton*, by her will, dated the 14th of September, 1801, gave and devised "all my share and shares, estate and estates, right, title and interest, of and in all that my freehold messuage, farm lands, and hereditaments," at *Flansham*, in the parish of *Felpham, Sussex*, to her sister, *Mary Streetin*, for life, and after her decease, to her nephew, *William Bridger*, and the heirs of his body, and for want of such issue, to her niece, *Elizabeth Bridger*, in fee.

At the time of making her will, Mrs. *Milton* had a devisable interest in several undivided shares, constituting together the entirety, of the freehold estate at *Flansham* mentioned in her will, to which were attached various rights of pasturage and common over lands in *Flansham*, now called *Flansham Brooks* and *Mow Mead*.

By indentures of lease and release, dated the 28th and 29th of September, 1807, the release made between *John Sowter* and *James Florance* of the one part, and the said *Ann Milton* of the other part, after reciting that by an award or deed-poll in writing under the hands and seals of the said *John Sowter* and *James Florance*, dated the 24th of July then last past, after reciting certain indentures of lease and release, dated the 4th and 5th of June, 1805, whereby after reciting that *George O'Brien*, Earl of *Egremont*, and the several other persons, including Mrs. *Milton*, therein named and described, parties thereto of the first part, were possessed of or entitled to certain lands and grounds situate in *Flansham* aforesaid, and called or known by the several names of *Flansham Brooks* and *Mow Mead*, according to the number of their horse, beast, and sheep leazes, or other rights of pasturage therein, or herbage thereof respectively, and to their respective rights of mowing in the said *Mead*, and that the several persons, parties thereto of the second part, did occupy and enjoy certain of the said lands and leazes, and exercised and used certain of the said rights as tenants or lessees of some of the parties thereto of the first part; and that the said *Brooks* and *Mead* respectively were in their then present state of much less value to the several persons interested therein than the same would be if divided and inclosed; and that the

said several persons, parties thereto of the first and second parts, had agreed to divide and inclose the said *Brooks* and *Mead*, and to enter into and subject themselves to the several rules, stipulations, penalties, and agreements thereinafter expressed concerning the same; and that more effectually to carry that object into operation, the parties thereto of the first part had agreed to grant, release, and convey, all their rights unto *John Sowter* and *James Florance*, and their heirs, upon the trusts nevertheless and for the purposes thereinafter mentioned concerning the same; it was by the said indenture of release [of the 5th of June, 1805] witnessed that the parties thereto of the first and second parts did thereby grant, release, and confirm unto the said *John Sowter* and *James Florance*, and their heirs and assigns, all those the said lands, known by the names of *Flansham Brooks* and *Mow Mead*, containing together by estimation 290 acres, or thereabouts, for the purpose of enabling them, the said *John Sowter* and *James Florance*, their heirs and assigns, to divide, set out, allot, assign, and convey to and amongst the several grantors, their heirs and assigns respectively, all the said *Brooks* and *Mead* in equal proportions according to their rights, privileges, and interests therein respectively, or to the annual value or rent thereof, as they the said *John Sowter* and *James Florance*, their heirs and assigns, should think just and equitable, and also to ascertain, set out, and appoint such roads or ways over the said *Brooks* and *Mead*, and to order the same to be kept in repair, as they should think proper, and to order and appoint ditches, drains, bridges, gates, and stiles, on the lands so to be divided, to be made and repaired at the expense of the proprietors of such allotments, as they the said trustees should direct; it was by the said award made known, and the said *John Sowter* and *James Florance* did by virtue and in pursuance of the said indenture of release [of the 5th of June, 1805], make, form, and draw up, that their award in writing in manner thereinafter mentioned, and did thereby (amongst other things) set out, allot, and assign unto the said *Ann Milton* in respect of certain lands called . . . belonging to her the said *Ann Milton*, and in the occupation of *William Tadd*, situate at *Flansham* aforesaid, twelve acres, part of the said *Brooks*, called *Flansham North Brook* (therein particularly described); and the said *John Sowter* and *James Florance*

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did, in further pursuance and exercise of the powers and authorities given unto them in and by the thereinbefore in part recited indenture of release [of the 5th of June, 1805], set out, allot, and assign, to and for the said *Ann Milton* in respect of her lands called . . . in the occupation of the said *W. Tadd*, situate at *Flansham* aforesaid, eleven acres, part of the said *Brooks* called *Flansham West Brook* (therein particularly described), as by the said in part recited deed-poll or instrument in writing, deposited and left, or intended so to be, in the parish church of *Felpham*, in the said county of *Sussex*, reference thereto being had, would appear; it was by the said indenture of release [of the 29th of September, 1807] witnessed, that in further pursuance and execution of the said recited indenture of release of the 5th day of June, 1805, and also of the said award or deed-poll, and also in consideration of the sum of 10*s.* to each of them, the said *John Sowter* and *James Florance*, well and truly paid by the said *Ann Milton* (the receipt, &c.), they, the said *John Sowter* and *James Florance*, did bargain, sell, release and confirm, unto the said *Ann Milton*, in her actual possession, &c., and to her heirs, all those twelve acres of land, part of the said *Brook* called *Flansham North Brook* (describing them), and also all those eleven acres of land, part of the said *Brook* called *Flansham West Brook* (therein described); to hold the said twelve acres of land, and also the said eleven acres of land, and all and singular other the premises thereby released, or intended so to be, and every part thereof, with the appurtenances, unto the said *Ann Milton*, her heirs and assigns, for ever, subject nevertheless as in and by the said award is directed or declared of or concerning the same, respectively.

The deed of 1805, recited in the deed of 1807, was not forthcoming, but Mrs. *Milton's* execution of it was not denied or questioned. She was made party to the deed of 1807, but died in that year, before it was executed, leaving co-heirs, whose interests, in 1822, all passed to the testator absolutely.

Mary Streetin died in or about 1817, and *William Bridger* died in 1820, leaving the testator his eldest son, who was in possession of the rents and profits of the allotments from his father's death to his own death in August, 1863.

Doubts having arisen as to the validity of the division under

the award, an Act was passed in 1826 to confirm it, but the Commissioner under that Act died, and his successor also died before any second award was made. *Thomas Boniface* was then appointed Commissioner, and, by an award dated the 23rd of April, 1840, he allotted to the testator the same lands as had been allotted to Mrs. *Milton*. It was admitted that the award of 1840 was executed by the Commissioner, but it had been lost, and was never enrolled or deposited in the parish church.

The question was, whether Mrs. *Milton's* will was revoked *pro tanto* by the deed of 1805.

Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*, Q.C., for the heir in tail of *William Milton Bridger* :—

The deed of 1807 did not carry out the partition. The partition was (or was to have been) carried out by the award, but only by the award, hence the will was not revoked.

Mr. *Armstrong*, for two adult devisees under the testator's will; and

Mr. *H. W. Cole*, Q.C., and Mr. *Streeten*, for infant devisees under the same will :—

Mrs. *Milton*, by deed, absolutely took this property out of her will. It is a stronger case than mere partition, for it cannot be here said it was not her intention to alter the estate.

Mr. *Willcock*, Q.C., and Mr. *Kekewich*, for the trustees and executors of the testator's will.

Mr. *Giffard*, in reply :—

The owners of these hereditaments were either tenants in common or joint tenants. No one could say that a single acre was his or her own. But jointly they could convey the whole land. What Mrs. *Milton* did, therefore, was to devise a hereditament, and then to grant that which was ultimately returned to her as land. Hence the subject-matter of the deed was so far different from that of the will as to take the case out of the ordinary one of partition, and the doctrine of revocation does not apply.

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SIR W. PAGE WOOD, V.C.:—

In this case the question is, whether or not a will, made by a Mrs. *Milton* in the year 1801, was revoked by a subsequent conveyance by the same lady in 1805, whereby the property in question was conveyed to trustees, who were to set out and apportion between certain commoners the lands in respect of which Mrs. *Milton* and other grantors made the conveyance. This deed of 1805 is not produced, but it is recited in a deed of 1807, and it has not been disputed that it must be taken that Mrs. *Milton* executed the deed of 1805. She was made a party to the deed of 1807, but she did not live long enough to execute it.

By her will in 1801, Mrs. *Milton* devised this property to her nephew, *William Bridger*, and the heirs of his body in tail, and, for want of such issue, to *Elizabeth Bridger*, in fee. The entail has not been barred, and, therefore, Mr. *Giffard's* client, the present tenant in tail, will be entitled to it, unless the will be revoked.

[His Honour then read the recitals and witnessing part of the release of 1807, as stated above, and continued:—]

Now, in the first place, I must observe that this deed is, in reality, a dealing with a sort of commonable interest which these parties had in the lands, rather than a simple division of lands held by them in severalty as tenants in common. It is, in truth, a sort of private inclosure instrument, which seems not to have proved effectual, and had afterwards to be dealt with in a different way, by Act of Parliament. But what I have to deal with is this deed; and I have to administer that law, which is now happily obsolete, by which, with a sort of remorseless logic, any person who had once made a will and afterwards disposed of his interest, for any purpose whatsoever, even although he might get back the identical estate which he parted with, was held to have revoked his will, and equity could not give any assistance except in the single case of a mortgage. The reasons for this doctrine are given at length by Lord *Loughborough* in *Brydges* v *Chandos* (1). But with regard to a mortgage, he says, this Court, considering

(1) 2 Ves. 417, 426.

the land but as a pledge for a debt, which is personal estate of the mortgagee, holds that the land, as to all other purposes, remains unaltered in the mortgagor. When the debt is paid off, it is as if the mortgage had never existed. Why the same sort of doctrine should not have been applied in such a case as that of Lord *Lincoln* (1), who, after having made his will, unfortunately conveyed to the use of himself in fee until marriage, which never took effect, or in such a case as that of *Lock* v. *Foote* (2), one can hardly see; but so it was: and this mode of entirely defeating a testator's intention by the magic of a conveyance, as I have said, is a logical application of the doctrine that a will is an appointment of real estate, as Lord *Loughborough* expresses it (3), and is not founded, as he correctly says, upon the effect of the word "having," in the *Statute of Wills*. Being an actual appointment of a specific thing, and that specific thing being otherwise dealt with, although immediately taken back again into the same hand which dealt it out, it was considered to have been destroyed and gone. That being so, the only exception in equity was the case of a mortgage, although Vice-Chancellor *Shadwell*, in *Lock* v. *Foote*, seems to have treated the case of a partition as an exception, on equitable grounds, also. Possibly there may be some error in the report; for, with great respect to that learned authority—and no one was more familiar with the law of real property than that learned Judge—a partition is an exception, not in equity merely, but in law. Lord *Loughborough* expressly says (4), that in the case where it occurred, which was *Luther* v. *Kidby* (5), the Chancellor sent it to law, upon a case stated for the opinion of the Judges, that he might decide in concurrence with the law. *A.* and *B.* were tenants in common, in fee, of certain lands. *A.*, by will, in 1819, devised his moiety in fee: and in 1822, *A.* and *B.* made partition, by deed and fine, declaring the uses, as to one moiety, to *A.* in severalty in fee; and as to the other moiety, to *B.* in severalty in fee. There was no conveyance to a trustee, as in this case, it was a mere release to uses; and being a question to be dealt with (and, as Lord *Loughborough* observes, only to be dealt

(1) Show. P. C. 154; 1 Eq. Ca. Ab. 411, pl. 11.
(2) 5 Sim. 618.
(3) 2 Ves. 427.
(4) Ibid. 429.
(5) 3 P. Wms. 170, (n.)

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with) by a Court of law, it was sent to the Judges, who were of opinion that the will was not revoked, and Lord Chancellor *King* acted upon their opinion.

In *Lock* v. *Foote* (1), Vice-Chancellor *Shadwell* says, "I have always considered it as settled, that every act which is a revocation of a will at law, is a revocation in equity, except where the object of the party, in doing the act, is merely to make a security for payment of debts, or where there is a dealing with the legal estate only" (that cannot be correctly reported; because a dealing with the legal estate has been over and over again held to be a revocation, except in the single instance where the testator merely clothes his equitable title with the legal estate, so that the two are brought together), "and except, also, in the case of a partition, in which last case, if there is a change of the use, the will will be revoked." That refers to the case of *Tickner* v. *Tickner* (2), where the limitations being to uses to bar dower, instead of to the old use, there was held to have been a revocation.

I do not think there is any case in which a conveyance to trustees out and out to make partition and divide, has been held not to be a revocation. It would be so in law: the legal estate being in trustees, and the conveyance not being to uses. I think that equity would follow the law in such a case of partition; there being no difference in the construction which this Court would place upon the instrument, from that which would prevail at law.

But this case appears to me to go far beyond that of simple partition. This was a further grant of certain lands and commonable rights, which are not the identical things devised by the will. The identical things devised by the will were the "share and shares, estate and estates, right, title and interest" of the testatrix in an estate to which the commonable rights were attached. Then all these rights, together with the land itself, are conveyed to trustees, who are to allot land in lieu of the rights which are to be extinguished, and all the land itself is to be set out to the parties, subject to certain conditions. The trustees are to have roads, ditches, and fences made—in truth, to perform all the operations of an inclosure under the Acts. I apprehend it must be

(1) 5 Sim. 628.

(2) Referred to in *Parsons* v. *Freeman*, 3 Atk. 742.

so considered here. I am very sorry it is so. I hope this will be one of the last cases in which this doctrine will have to be administered. Cases of this kind are becoming less and less frequent since the passing of the *Wills Act;* but this will having been made in 1801, I am obliged to hold that it is subject to the law as it then stood, and that the will is revoked.

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Solicitors: Messrs. *Dawes & Sons,* agents for Messrs. *Gill & Bush, Bath;* Mr. *William Flower.*

In re LONDON AND COUNTY COAL COMPANY.

V.-C. W. 1866 *Dec.* 8.

Company—Winding-up—Companies Act, 1862, *s.* 79.

The articles of a company adopted an agreement whereby 240 paid-up shares were to be delivered to the manager "for his own use, and in order to supply him with the means for commencing the duties of management, and for discharging obligations incurred by him in promoting the formation of the company." The Petitioner, in reply to an advertisement for a secretary, announcing that he would be required to invest £240, applied for and obtained the appointment, and paid £240 for shares in the company. He then discovered a second agreement, whereby the manager had agreed, as soon as he should receive the 240 shares, to give to each of the four promoters who had signed the first agreement on behalf of the company, and who were named directors in the articles, forty shares, that being the number of shares necessary for the qualification of directors. Only one promoter and director out of the seven promoters (five of whom were named directors) who signed the memorandum, six of them for forty shares, and one for ten, had paid anything in respect of his shares, and there were only six other shareholders.

Upon Petition for winding up the company, although presented within three months of the date of incorporation, the Court, upon the above facts, made the order.

THIS was a Petition presented on the 7th of November, 1866, by a contributory, to wind up the *London and County Coal Company, Limited.*

From the statements it appeared that the company was registered on the 11th of August, 1866, with a capital of £100,000, in 20,000 shares of £5 each, for dealing in coals. The memorandum of association was signed by seven persons—by six of them,

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Waldron Burrowes, David Douglas Wemyss, George Bennett, William Clonbrook Creighton, William Abbotts Smith, and *Sylvester Charles Capes,* for forty shares each, and by the seventh, *John Bennett,* for ten shares. By the 7th article of association, *Smith, Burrowes, Creighton, Wemyss,* and *George Bennett,* were declared to be the first directors of the company. By Article 69 the directors were directed and empowered to carry into effect an agreement dated the 7th of June, 1866, between *Smith, Burrows, Creighton,* and *Wemyss,* of the one part, and *George Bennett* of the other part; but the purport of the agreement was not set out in the articles. By this agreement *George Bennett* was to be employed as manager of the company, with a salary of £200 a year. The parties thereto of the first part also agreed to pay *Bennett* £250 in cash and £750 in fully paid-up shares, as soon as the company should have received in respect of shares allotted £1500; and further sums of £250 in cash and £750 in fully paid-up shares as soon as the company should have received in like manner £5000. The agreement also contained the following clause:—

"They also agree as soon as possible after the said company shall have been incorporated, to deliver to the said *George Bennett* for his own use, and in order to supply him with the means for immediately commencing the active duties of management, and for discharging certain obligations incurred by him in promoting the formation of the said company, 240 fully paid-up shares of £5 each in the said company."

By the prospectus 10*s.* was to be paid on application for shares, and 10*s.* on allotment; and the directors were announced to be *Smith, Burrowes, Creighton, Wemyss* (not *George Bennett,* but also) *Capes,* and one *T. Richards.*

In July advertisements were issued by the promoters for a secretary and an assistant-secretary, and it was announced that the secretary would be required to invest £240, and the assistant-secretary £50. The Petitioner, *Francis Pictet,* applied for and obtained the post of secretary, and he took eighty shares of £5 each, and paid £240 upon them. By agreement, dated the 1st of August, 1866, his salary was to be £200 a year. A Mr. *G. E. Hunt*

also applied for and obtained the appointment of assistant-secretary, and he took ten shares, upon which he paid £50. A Mr. *Suckling* had also taken twenty-five shares, for which he had paid £25; and a Mr. *Quicke* had taken five shares, for which he had paid £5. These were the only shareholders in the company. Mr. *Capes* had paid £40 on his shares, and the above mentioned sums of £240, £50, £25, £5, and £40, were all the capital that had been raised. No one, except the Petitioner and the other persons above named, had paid anything in respect of any shares in the company.

Soon after the Petitioner became secretary, he ascertained that immediately after the agreement of the 7th of June, 1866, was signed, *Bennett*, jun., signed and gave to each of the parties thereto of the first part, viz. *Smith*, *Burrowes*, *Creighton*, and *Wemyss*, a memorandum, whereby he agreed to give to each of them forty fully paid-up shares in the company so soon as he should have received the 240 shares referred to in the agreement. The Petitioner thereupon refused to make out and deliver to *Bennett*, jun., the certificates of the 240 shares. A case was submitted to counsel, and his opinion was unfavourable to the directors; but they nevertheless (with the exception of Mr. *Capes*) declined (as the Petition alleged) to pay anything in respect of the shares.

It was alleged that attempts to induce the public to take shares in the company had failed; that the company had bought and sold a little coal, on which a profit of £7 10*s.* had been made, but practically had no business; and that it had no assets beyond some trifling sum at its bankers, its office furniture, and a small stock of coal.

The Petitioner also claimed from the company a sum of £33 6*s.* 8*d.*, in respect of arrears of his salary, which they had refused to pay; and finally averred, that though the debts were small, the company was unable to pay them; that it was under liabilities which it could not discharge, except by a winding-up, that it was a bubble company, and that even if the company were not unable to pay its debts, it was just and equitable that it should be wound up.

He also stated that Messrs. *Hunt*, *Suckling*, and *Quicke*, the only shareholders besides the Petitioner (other than the directors)

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in the company, supported the application. Mr. *Hunt's* support, however, was disputed.

Messrs. *Smith, Creighton, Capes,* and *Wemyss,* by an affidavit in answer, said that the Petitioner had never complied with his engagements under the agreement of the 1st of August, 1866, beyond paying the £240; that he had grossly neglected his duties as secretary; and had endeavoured to bring the company to ruin. They also charged him with removing from the offices, on the 28th of September, the banker's pass-book and cheque-book, and other papers, which, however, he afterwards returned; and alleged that by his absence from meetings, and his total neglect of the duties of secretary since the 28th of September, he had discharged himself from his office. They said that the debts of the company did not exceed £50, and that the subscribed capital of the company, to be paid up, was £1390. They said that up to the present time they had received no personal benefit whatever from their connection with the society, nor received any fee for their services. As to the memorandum given to them by *Bennett,* they said it was a voluntary act on his part, and was intended as an acknowledgment of the assistance they had rendered him. They denied that they (except Mr. *Capes*) had refused to pay their allotment money. They said, on the contrary, that they intended to pay the amounts due from them, and admitted their liability in respect thereof.

Bennett, the younger, by his affidavit, said that he shewed the Petitioner the original agreement of the 7th June, but said nothing about the sub-agreement with the four directors to return them the 240 shares.

Mr. *Lindley,* for the Petitioner:—

The Petition is presented under clause 5 of the 79th section of the *Companies Act,* 1862, on the grounds that this was a bubble company, and that there have been underhand dealings on the part of the directors.

[He was stopped by the Court.]

Mr. *Cracknall,* for the company:—

The directors admit their liability to pay the deposit money. The only question is, whether the Court will deem it just and

equitable that this company, which is only in the course of formation, should be wound up within three months of its registration. Short as the time is, it has commenced business, and the only alleged debt is the £33 odd claimed by the Petitioner. The Court will not sanction a winding-up Petition for the sake of procuring payment of a disputed debt: *In re Catholic Publishing Company* (1).

Where a company consists of a small number of members, the Court will not apply the machinery of a statutory winding-up: *In re Natal, &c., Company* (2).

SIR W. PAGE WOOD, V.C.:—

I think if there had been a *bonâ fide* intention on the part of the directors to carry on business in a proper manner, this is a case in which I should not have made an order for winding up, on account of the smallness of the company, there being only a few members—who, in the ordinary course of things, might have settled their affairs in a more convenient and less expensive manner.

But this is one of the most extraordinary cases that has ever been brought before the Court. [His Honour stated the facts and continued:]—

The circumstance that the sub-agreement relative to the return of the 240 shares to the directors for their qualification was not made known to the Petitioner, exonerates him from a great deal of observation to which he would otherwise have been open. But to the public, this agreement is held out as a solemn contract between these directors, acting on behalf of the public, on the one hand, and *Bennett* on the other, that they will give him 240 shares to enable him to start the company, and "for discharging certain obligations incurred by him in promoting the formation of the said company." Anybody seeing that, as the Petitioner did, would suppose that the directors, who were contracting on behalf of themselves and those who should repose confidence in them and come under their management, thought that *Bennett* had a fair claim to these shares, and

(1) 33 L. J. (Ch.) 325; 10 Jur. (N.S.) 301. (2) 1 H. & M. 639.

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that they were allotted to him for a proper consideration. Instead of that it was a bargain to get something for themselves. Virtually, they say this: "We agree to give you something, that you may pay it back to us—that you may 'discharge an obligation incurred by you,' whereby we will rob the public of so much money, and put it into our own pockets." No other language will properly describe the transaction. It is a mere contrivance, under the guise of an agreement for the advantage of the company, to plunder the public to this extent. In that state of things, it is expedient alike for the public, the Petitioner, and these gentlemen themselves, who have paid not the least regard to justice and propriety, that the company should be at once abolished.

But the case does not rest there. These gentlemen having entered into this arrangement between themselves and Mr. *Bennett*, were told by their legal advisers that it could not stand in the shape in which they wished to have it. They found they must pay upon the forty shares. But this they all (with one exception) were unable to do. It should be mentioned, to the credit of one of these gentlemen, Mr. *Capes*, that he has paid his £40; and the other directors are entitled to the benefit of the observation that Mr. *Capes* wishes the company to be continued, though how or why he can wish it I cannot tell. But the directors allow this Petition to be presented on the 7th of November, no one of them (with the exception of Mr. *Capes*) having, during a period of three months, from August to November, paid a single shilling on their forty shares; their first duty having been to collect from all the shareholders, and of course from themselves, the subscriptions due upon their shares. They say, indeed, in the affidavits on which this Petition comes on, filed only yesterday, that they mean to pay the money, they being the first who ought to have contributed.

The next step is a curious transaction, shewing how cautious the public should be in dealing with these companies. These gentlemen, not having any money of their own (for if they had had any, I must assume, out of regard for their own characters, they would have paid these deposits), thought it would be the best thing to get somebody else to pay for them. They accordingly advertise for a secretary and a sub-secretary, and state that the secretary will be expected to pay £240 (which this Petitioner has

done), and the sub-secretary £50. I believe a small profit of £7 10s. has been made; but with this exception, all the expenses of the company have been paid out of the advances of the unfortunate secretary and sub-secretary.

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Then I am asked to continue this wretched concern. I say, extinguished it must be; and although, perhaps, the parties might find a more beneficial mode of extinguishing it than through the medium of a winding-up order, a winding-up order I shall make.

Ordered accordingly.

Solicitors for the Petitioner: Messrs. *Bower, Son, & Cotton.*
Solicitor for the Company: Mr. *Charlton.*

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

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V.-C. W. 1867 *Jan.* 19, 21.

Company—Rectification of Register—Trustee for Company—Indemnity—Contributory.

Shares in a company were transferred into the name of *A.*, with his consent, to be held by him as a trustee for the company:—

Held, that, although a person wrongfully put upon the register would have a right to relief even as against creditors, *A.*'s name having been placed by his own consent upon the register, he was liable as a contributory, although he might have a right to be indemnified by the company for any payments made by him in respect of the shares, of which he was merely a trustee.

THIS was an application by summons, adjourned from Chambers, on behalf of Messrs. *Chapman* and *Barker*, alleged contributories of the *Imperial Mercantile Credit Association, Limited*, in respect of 325 shares, to substitute as contributories in such company the name of the association, or otherwise that the names of *Chapman* and *Barker* might be removed from the list of contributories of the company, or, in the event of such application being refused, then that *Chapman* might be declared entitled to retain in his possession the several ships now registered in his name, or the proceeds to be raised by the sale of such ships, as a security against any call now

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made or hereafter to be made on them (*Chapman* and *Barker*) in respect of the 325 shares, and that they might be at liberty to pay any call (present or future) out of such proceeds.

It appeared that Mr. *Chapman* was the chairman, and Mr. *Barker* the general manager of the association, and that, in course of their business, the association acted as agents and correspondents of Messrs. *Issaverdens & Co., Constantinople*, in which capacity it was alleged that the association, by virtue of their articles of association, were empowered to act. In April, 1865, *Barker* was instructed by telegram from *Constantinople* to obtain for Messrs. *Issaverdens* certain securities belonging to them, consisting of 325 shares in the association and 300 shares in the *International Land Credit Company*, which had been lodged with Messrs. *Joyce & Co.* Acting upon this telegram, and a subsequent letter, the association put themselves in communication with Messrs. *Joyce*, and succeeded in obtaining transfers of the shares. The transfers of the 325 shares were dated the 29th of June, 1865, and were made to Messrs *Chapman* and *Barker* as officers of the association, acting as agents of Messrs. *Issaverdens & Co.* The case on behalf of these gentlemen was, that the transaction was one in which they had not any personal interest whatever, and that in accepting these transfers they acted only as officers and trustees of the association, in order that the association might hold such shares as a security for any amount which might be due to the association from Messrs. *Issaverdens & Co.*, and subject thereto on their account; and that ever since the shares had been transferred into their (*Chapman's* and *Barker's*) names, the association had held the certificates and received the dividends which had been placed to the credit of Messrs. *Issaverdens & Co.* Certain ships and other securities were also standing registered in the name of *Chapman* and another gentleman as trustees on behalf of the association; and in the event of his name being retained upon the list of contributories in respect of the 325 shares, *Chapman* claimed the right to realize such securities in order to indemnify himself and *Barker* against all liabilities in respect of calls upon the 325 shares.

Mr. *Kay*, Q.C., and Mr. *Ferrers*, in support of the application, contended that the company, and not the applicants, who were

merely trustees, and had no interest whatever in these shares, were liable as contributories in respect of them. The company were bound to indemnify the applicants against all loss and liability whatever in respect of these shares, and it was distinctly laid down by Lord Justice *Turner*, in *Saunders' Case, Re The Waterloo Life Assurance Company* (1), that a company could not insist upon having their own trustee put upon the list as a contributory; and the creditors, whose rights were entirely moulded by the Act of 1862, could assert no greater right against the applicants than was possessed by the company. The register was no doubt *primâ facie* evidence to creditors that the persons named therein were shareholders, and liable for the amount remaining unpaid upon their shares; but as every payment made by these gentlemen in respect of the particular shares would create a corresponding debt due to them from the company, the shares in their hands did not represent assets of the company available for creditors, and the *primâ facie* evidence afforded by the register was rebutted by the facts of the case. When shares were put in the name of a trustee, then the company had nothing to do with the *cestui que trust*, or person beneficially entitled to the shares (no notice of any trust being admissible upon the register: *Companies Act*, 1862, sect. 30), and looked to the trustee for payment of the calls. But the case where the company itself was *cestui que trust* was wholly different. By holding these gentlemen liable as contributories the result would be, to render two classes of persons (trustees and *cestuis que trust*) liable for the same shares; and it had never been held, as between the company and the actual holders, that two persons were liable for the same shares.

The VICE-CHANCELLOR referred to *Grissell's Case* (2).

Mr. *Kay*:—That case went entirely upon the right of a shareholder who was also a creditor to set off the debt due to him against the calls. We do not rest our claim on the ground of set-off, but on our right to be indemnified by the company against all payments made by us in respect of these shares, of which we are merely trustees.

(1) 2 D. J. & S. 101: 10 Jur. N.S. 246 (2) Law Rep. 1 Ch. 528: 1 Jur. N.S. 718

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But even if the Court should hold that these trustees must be retained upon the list as contributories, and made liable for the shares, they ought at all events to be allowed to retain that property, now vested in them as trustees, which was beneficial, for the purpose of indemnifying themselves for the loss upon the other species of trust property.

Mr. *G. M. Giffard*, Q.C., and Mr. *Lindley*, for the official liquidators, were not called on.

SIR W. PAGE WOOD, V.C.:—

I have no doubt at all in this case that these gentlemen are contributories. The Act (25 & 26 Vict. c. 89), requires that a register of all the shareholders shall be kept, and when the company is a limited company, directs (sect. 8), that the memorandum of association shall contain the name of the company; the place of the registered office; the objects for which the company is established; a declaration that the liability of the members is limited; and the amount of capital with which the company proposes to be registered, divided into shares of a certain amount. Then it is provided, by sect. 25, that a register of the members must be kept by every company under that Act, containing the names, addresses, and occupations of the members of the company, with a statement (in the case of a company having a capital divided into shares), of the shares held by each member, and of the amount paid, or agreed to be considered as paid, on the shares of each member. Now, as limited companies must have their capital divided into shares, the whole of this section applies. It appeared to me, in a former case, *In re Anglesea Colliery Company* (1), that when there was an agreement with a person to take payment in paid-up shares, all that the company would have to do would be to say that the person had paid so much, or that it was agreed that he should be taken as having paid so much, and he might be entered as a holder of shares on which the full amount had been paid up. Therefore, in the case of a trustee for the company, they might (if the articles of association allow it), provide that the trustee for the company should take the number of shares required to be taken for them;

(1) Law Rep. 2 Eq. 379: 12 Jur. (N.S.) 498.

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but that they must be entered as wholly paid-up shares. These entries are obviously made for the benefit of creditors, to enable them, from the entry of what was paid up, to see what they could rely upon as unpaid assets of the company.

The other sections, 39 and 41, as to the registered office of the company, and the publication of its name by a limited company; sect. 30, that no notice of any trust shall be entered upon the register; and sect. 32, giving access to the register for inspection by members and any other persons, all point to the same thing. The object clearly was, that persons dealing with companies should know with whom they are dealing. I have entirely in my mind the observations of Lord Justice *Turner*, in *Ship's Case* (1), that creditors of the company trust the company, and those who are, or may be *bonâ fide* members, in this sense, that they are people who are properly upon the register. I have not the least misgiving whatever that *Ship's Case* was correctly decided, and I shall not have any until it is decided in a contrary way by higher authority. If the mere placing a name upon the register, rightly or wrongly, is to give the creditors a right to proceed against the individual, any one of us now in this Court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder. In *Ship's Case*, there was no difference in substance from the case supposed of a company, by fraud, inducing a man to have his name placed upon the register of a company different from that which he intended: in other words, if Company *A.* register my name in Company *B.*, it is the same as if I had not entered into any contract with them. The case is wholly different where a person agrees to have his name put upon the register for any purpose. The creditors have a right to take as their debtor everybody who is properly upon the register, including the trustees for the company. But creditors do not, therefore, obtain the right of insisting upon retaining as their debtor a person whose name has been placed there by fraud or wrong, and ought never to have been there at all. An important question might arise as to how far a person, after he knows that his name has been wrongly placed upon the register, may by acts

2 H. L. 350

(1) 2 D. J. & S. 544: 12 Jur. N. S. 331.

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of acquiescence—such as accepting a dividend, or the like—be held to be liable. It is like any other case: he cannot approbate and reprobate. If, for his own convenience, he adopts the act, he must be liable for the consequences of the act. The question whether he has, or has not, adopted it, is wholly one of degree and of evidence for the Court. But I cannot entertain any doubt that a man who is placed by the directors, through contrivance, in a position which they are not entitled to place him in, will not be liable to creditors, or to anybody else. The creditors trust the company that they will conduct their business legitimately and properly according to the Act. Now these gentlemen have been placed upon the register most legitimately and properly. They knew perfectly well that the trust could not be recorded upon the register (*Companies Act*, 1862, s. 30): one of the objects of that section being to free, not only the company, but creditors also, from the responsibility of inquiring after those other persons for whom the shares are held. If they have been unlawfully placed upon the register, they cannot be retained there. But if they are lawfully upon the register, which Messrs. *Chapman & Barker* are, they have been placed there by their own act as owners of the shares, on which so much has been paid. There they are, and there they must remain. As between themselves and the company, they would, no doubt, be entitled to an indemnity; but that is a question between themselves and the other shareholders, which they will have a right to assert in a proper way. It is expressly provided by rule 7 of sect. 38, of the *Companies Act*, 1862, that this right of indemnity (in respect of any sum due to him from the company), cannot be asserted by a member as against creditors and the external world, though the section goes on to provide that "any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves." This does not at all lead to the consequence which was suggested, of having two persons liable for the same shares. When the trustee pays the calls, the *cestui que trust* is liable to him, and there is no difference in the circumstance that here the company is the *cestui que trust*. He will get his indemnity by filing his bill for the purpose; but the fact of the company being *cestui que trust*, makes no difference whatever with reference to the position of creditors. These gentle-

men have agreed that their names shall be placed upon the list for the purpose of informing the world that they are the owners of the shares. The trust on behalf of the company is not to appear, and they have agreed to put themselves in the position, and rightfully in the position, of persons who have undertaken to contribute to the debts of the company.

The present case has nothing whatever to do with that which was relied on in support of the application: *Re The Waterloo Life Assurance Company, Saunders Case* (1). Mr. *Saunders* was not on the register, and the question being whether he should be put upon the list of contributories, the Lord Justice considered that he could not. Before the whole thing was completed, could a bill have been filed to compel *Chapman* and *Barker* to be put upon the register? It would have been a mere *nudum pactum*, and, as Lord Justice *Turner* said, the company would have no case for forcing the trustees to be put upon the list. That was the result of the decision; but I think it has no bearing upon this particular case, where the names are actually upon the register. The application to remove their names must be refused; but as they have been led into the difficulty by the act of the company, they will not have to pay any costs, though I shall not give them any.

[No decision was pronounced upon the second branch of the application, the Vice-Chancellor observing, that the proper time for discussing the question of indemnity would arise when it was attempted by the official liquidator to take the ships and other property out of the hands of these gentlemen.]

Solicitors: Messrs. *Maynard, Son, Markby, Denton & Co.* Messrs. *Ashurst, Morris, & Co.*

(1) 2 D. J. & S. 101.

V.-C. M.

1866

Dec. 18.

CLEGG *v.* ROWLAND.

Liability of Executors—Distribution of Assets under the Act 22 & 23 *Vict. c.* 35—15 & 16 *Vict. c.* 86, s. 42, *r.* 9—*Parties.*

An executor who has distributed the assets of his testator, after issuing advertisements, and taking the steps pointed out by the Act 22 & 23 Vict. c. 35, will have the same protection as if he had administered the estate under a decree of the Court; and if he should have retained any legacies as trustee, after appropriating them for the benefit of the *cestui que trusts*, he will no longer be under any liability *quâ* executor.

BY a settlement made on the marriage of *Brierly Rowland* and *Charlotte Clegg*, dated the 22nd of May, 1833, certain property was conveyed to trustees, upon trust to pay the rents and profits to *Charlotte Rowland* during the joint lives of herself and *Brierly Rowland*, and after the death of either of them, then to the survivor for life, and after the death of the survivor, upon certain limitations for the benefit of children, and in default of children, the property was to be in trust for such persons as *Charlotte Rowland* should appoint by will, and in default of appointment, upon further trusts therein expressed.

On the 1st of September, 1834, a lease was granted by the husband and wife, and by the trustees, of two mines lying under certain parts of the premises comprised in the settlement, and the proceeds of the mines were received by the husband till his death, which took place in September, 1860. The wife died in June, 1863, having, by her will, made an appointment of the property under the provisions of the settlement, in favour of persons who were now represented by the Plaintiffs.

This bill was filed against the executors of *Brierly Rowland*, and against *John Rowland*, the surviving trustee of their marriage settlement, praying that it might be declared that *Brierly Rowland* was at the time of his death liable to account for the various sums received by him as the profits arising from the mining lease, and that the estate of the husband was now liable to account for and pay to the Plaintiffs such principal sums, together with interest thereon from the time they were received; and the bill prayed

that the Defendant, *John Rowland*, as the surviving trustee of the settlement, might be declared liable for such sums as were received by *Brierly Rowland* with the privity of the Defendant *John Rowland*.

The bill alleged that there was no power under the settlement to grant mining leases.

To this bill the Defendants demurred, on the ground that the powers contained in the settlement enabled the trustees to grant leases of the unopened as well as open mines.

The demurrer was argued on the 2nd of March, 1866, and is reported (1). Vice-Chancellor *Kindersley* overruled the demurrer, and decided that the trustees had no power to grant leases of unopened mines.

The cause now came on for hearing.

By the answer of the executors of *Brierly Rowland* it was stated, that in the month of November, 1860, they caused advertisements to be inserted in the *London Gazette* and in the *Times* newspaper, and in several country newspapers, with reference to the estate of *Brierly Rowland*, pursuant to the 31st section of the Act, 22 & 23 Vict. c. 35, requiring persons having debts or claims upon the estate to send in particulars thereof on or before the 1st of February following, at the expiration of which time the executors would consider all creditors' claims excluded, and would proceed to distribute and appropriate the deceased's estate, for the benefit of the parties entitled under his will. That shortly after the said 1st of February, 1861, they, not having then had any notice of the Plaintiff's claim, and with the full knowledge of the Plaintiff, distributed the whole of the net residue of the personal estate of *Brierly Rowland* among the persons entitled under his will, that is to say, they had paid such parts thereof as were payable to legatees, absolutely to such legatees, and had appropriated such parts thereof as were settled by the will in favour of persons in succession, to answer the several gifts to such persons, and thereupon there remained no part, and there was not at the time of the filing of the bill, and there was not then any part of the estate in the hands, or under the control, of the executors in their character of executors of the will.

(1) Law Rep. 2 Eq. 160.

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They therefore submitted that the Plaintiff's claim must, under the circumstances, be made against the persons beneficially entitled under the will of *Brierly Rowland*, and not against them as executors of such will.

Mr. *Osborne*, Q.C., and Mr. *Karslake*, Q.C., for the Plaintiffs who were interested under the power of appointment executed by the wife:—

The proceeds of the mine must be considered as *corpus;* and the estate of the husband who improperly received the proceeds of the mine is liable to make good to the estate of the wife those sums which he so received.

[The VICE-CHANCELLOR said the first question was, whether this suit was properly constituted, that is, whether the executors, having distributed the assets under the provisions of *Lord St. Leonards' Act*, were the proper persons to be sued.]

We say that the creditors have a right to go against any part of the estate wherever they can find it. The first persons liable are the representatives of the testator whose estate is liable. The Defendants say they have distributed the assets under *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), but the course they pursued was marked with unusual dispatch, and there was not sufficient time allowed for creditors to come in. The testator died in September, 1860, the advertisements rendered necessary by the 29th section of the Act were issued in the following November, and creditors were required to come in by the 1st of February, 1861. The executors contend that, after adopting these speedy proceedings, they are exempted from any liability, but it could never have been the intention of the Legislature that a creditor should be compelled to bring before the Court all the different legatees, some of whom may have received a portion of the assets. In many cases they would be very numerous, and in all cases there would be great difficulty and expense in going against the legatees. Moreover, in this case, the executors have retained in their hands some portion of the funds for several of the legatees who are not yet entitled to receive their legacies; and, at any rate, they are rightly made parties in respect of those sums, since the executors

represent the estate of the *cestuis que trust*. The 9th rule of the 42nd section of the *Chancery Improvement Act* (1) applies to such a case as this, that it shall not be necessary to make the persons beneficially interested under the trusts, parties to the suit, but the Court may, upon taking the accounts in Chambers, or at the hearing, if it should see fit, order such persons to be made parties. If this course should be thought necessary, the bill might now be amended by adding the parties beneficially interested.

Mr. *Baily*, Q.C., and Mr. *Jolliffe*, for the Defendants, were not called upon.

SIR R. MALINS, V.C.:—

This bill is filed by the Plaintiffs, contending that there was an improper dealing with an estate, which was comprised in a settlement, by granting leases of unopened mines when there was no power to grant such leases. It is then said that the husband, Mr. *Brierly Rowland*, he himself having an estate for life in remainder, and his wife having a general power of appointment over the estate, received the proceeds of the mines which were improperly worked under this power of leasing, and that his assets are now liable to make good to the Plaintiffs, who are entitled to the inheritance, the proceeds of the mines. For the purpose of the present decision I assume that the Plaintiffs are entitled to succeed in that contention, though I give no opinion upon it. The parties to this suit are *John Rowland* the elder, the surviving trustee of the settlement under which the limitations were created, and the executors of the husband who improperly received these proceeds of the mine, and the constitution of the suit might have been right if the assets of the testator had still been in the hands of his executors. But the executors have put in an answer, in which they state, that, before the institution of this suit, they had taken the course pointed out by the Act 22 & 23 Vict. c. 35, under which this great protection is given to executors, that whereas, up to the time of the passing of the Act, no executor could safely distribute the assets of his testator except under the direction of this Court, which involved great expense, and fre-

(1) 15 & 16 Vict. c. 86.

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quently great delay, this Act now provides that any executor issuing certain advertisements, which advertisements, it is admitted by the Plaintiff in this case, were inserted in strict accordance with the provisions of the Act, may distribute the assets, and shall not thereafter be answerable any more than he would have been if he had distributed them under the decree of this Court. But then, as the doctrine of the Court always provided for creditors who had not been satisfied, and reserved to persons who had claims the existence of which was not known at the time, the right to resort to those persons to whom the assets had been handed, this Act, by the 29th section, provides that "nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

Now the executors, after setting forth the steps they have taken in pursuance of the Act, state that they have distributed "the whole of the net residue of the personal estate of *Brierly Rowland* amongst the persons entitled under the will—that is to say, they have paid such parts thereof as were payable to legatees, absolutely to such legatees, and appropriated such parts thereof as were settled by the will in favour of persons in succession to answer the several gifts to such persons, and there remained no part of the estate in their hands, or under their control, in their character of executors." The truth of that statement is not controverted. It is therefore an established fact in this suit, that when this bill was filed the executors had duly administered the whole of the assets; and there did not remain in their hands, as executors, a single shilling.

But it has been argued for the Plaintiff that, although they have administered the assets of the testator, it appears by the probate of the will that several of the legacies, amounting to a considerable proportion (perhaps three-fourths) of the assets of the testator, was given to the executors upon trust, and that those assets are still in their hands, and must therefore be considered as answerable to this demand. I do not know how that may be, but I am bound to assume, on this answer, that they have no assets whatever in their hands; and this is clear, that if they had assets

which are given to persons for life with remainders over, and they have appropriated those legacies, the money is no more in their hands, as executors, than the legacies which they have actually paid over to the persons absolutely entitled. They have, in pursuance of the provisions of the will, assented to the bequests, and paid them by making an appropriation, and the legacies, being appropriated, are no longer in their hands *quâ* executors. In what character, then, are they sued? In what character is the liability sought to be fixed on them? Solely in the character of executors.

Then it is said that, as they are executors, I am at liberty to make a decree against them, leaving the parties who are beneficially interested to contest the claim sought to be established against them, in Chambers. But I can hardly think the Plaintiff's counsel was serious in that contest, in asking me, after the executors have absolutely paid over the assets, when they have no longer a particle of interest in the question between the Plaintiff and the *cestuis que trust*, to go through the farce of having a contest in this Court, in which parties greatly interested on one side make a claim which is to be resisted on the other side by those who have no kind of interest in resisting it; and if these executors, either by a defective mode of defence, or from any cause whatever, were to admit the claim to be established against the estate, it might be that the unfortunate *cestuis que trust* would find themselves in Chambers simply to submit to the account resulting from a litigation over which they have had no kind of control. I cannot accede to any such argument. I think it is wholly unfounded, and is contrary to the whole principle and object of the Act of Parliament.

It is admitted that there is a discretion in the Court by the 9th rule of section 42 of the *Chancery Improvement Act* (1), and I find by the decisions upon this section which are collected in Mr. *Morgan's* book (2), that in all cases where the Court sees executors or trustees are wholly uninterested in the matter, and there are parties who are materially interested in the question, it will never make a decree in the absence of those parties who are alone interested in the contest, but will have them brought before the Court in order that those who are interested in resisting the

(1) 15 & 16 Vict. c. 86. (2) 3rd Ed. p. 196.

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demand, may resist it at the proper time, which is the hearing of the cause. Here, in a case of great importance and involving a considerable amount, and where the question depends on whether mines were properly or improperly worked, I am gravely asked to make a decree in the absence of the only persons who have any interest whatever in resisting the demand.

Then it is said that the executors, at all events, are necessary parties, and that therefore they ought to be retained here, with liberty to amend the bill. But I cannot assume, even, that it is necessary to make the executors parties. It may become necessary now that they are trustees, and have the absolute dominion over the fund, to make them parties in another suit; but *quâ* executors they can no longer be necessary parties to this suit, because, *quâ* executors, they have parted with the assets. If I were to accede to the proposition, that you may make executors parties, notwithstanding they have parted with the assets, the consequence would be that every executor, twenty years after he had parted with the assets, with full knowledge of the parties that he had done so, might be brought before this Court from time to time, and dragged into a contest. In fact, I cannot see what the consequences to executors might not be; whereas the true policy of the Act, which is in accordance with the rule of this Court, is, that when executors have fully administered the estate, and handed the assets over, the right to the assets is against the person who has received them, and not against the executors.

It appears to me, therefore, that this bill is wholly wrong in its constitution. The executors have no longer any liability, and this is an attempt to establish a liability against them in their character of executors only.

The only point that could be argued is, whether under these circumstances the bill should be retained, with liberty to amend, on such terms as I might think fit to impose. I do not intend, by my present decision, in the slightest degree to prejudice the rights of these Plaintiffs. I assume they have a right to recover all that they seek to recover in this suit. I assume that, in another form, it may be necessary to make these very gentlemen who are Defendants here, Defendants in another suit; but by making them Defendants in their character of executors the bill is miscon-

ceived, and therefore I think it ought to be dismissed, with costs, but without prejudice to any other bill the Plaintiffs may institute against them in any other character, or in any other way.

It is of the highest importance that there should be no doubt as to the protection given to executors by this Act. I am told that this is the first case in which the question has come before the Court, and I intend to act on the principle that, by these advertisements, and by these proceedings under the Act, an executor is entitled to have, and in point of fact has, all the protection which he would have had under the old rule of the Court, if the assets had been administered by such executor under the decree of the Court. I may say that, in taking the course I have done, it does not occur to me there will be any material difference in expense between retaining the present bill and filing a new bill, because I must have given all the costs after the answer came in.

Solicitors for the Plaintiff: Messrs. *N., C., & C. Milne.*

Solicitors for the Defendants: Messrs. *Bower, Son, & Cotton;* Messrs. *Clarke, Woodcock, & Ryland.*

In re ORTON'S TRUST.

Will—Gift, original or substitutional—Period of Distribution—Vesting.

A testator devised certain property upon trust for his two sons, and then to sell and divide the proceeds equally among such of his five daughters as should be living at the decease of the survivor of his two sons, and the children, grandchildren, and issue, of such of his daughters as should then happen to be dead; such children, grandchildren, and issue, respectively, to take equally among them the shares which their parents would have been entitled to, had such parents been then living. *Mary*, one of the testator's daughters, whose share was now in question, died before the surviving son, having had ten children, of whom six died in her lifetime, and one other before the surviving son. One of the seven had children still living, another had a child who survived her mother, and died before the period of distribution, and the other five had no issue:—

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Held, that the gift to the children of *Mary* was not substitutional, but an original and independent gift, and that it was not necessary that they should survive the period of distribution in order to take:

Held, also, that the grandchildren of *Mary* took only the shares to which their respective parents would have been entitled, and not equal shares with the children. The fund was, therefore, divisible into tenths, each child, or his representatives, taking one-tenth.

11 Jur 528.

THOMAS ORTON, by his will, dated the 2nd of February, 1822, appointed *T. Clubbe* and *J. Meredith* his executors; and he devised and appointed certain messuages, lands, and hereditaments, therein specified, to his executors and their heirs, upon trusts in favour of his sons *Thomas*, and *Robert*, and their children, and in the event of the death of *Thomas* and *Robert* without children, upon trust to sell and dispose of all the said messuages, lands, and tenements. And the will then proceeded: "And I bequeath the money to be raised by such sale or sales as aforesaid, unto and equally amongst such of my five daughters, *Martha*, *Mary*, *Jane*, *Maria*, and *Elizabeth*, as shall be living at the decease of the survivor of my said sons, and to the children, grandchildren, and issue, of such of my said daughters as shall then happen to be dead, such children, grandchildren, and issue, respectively, to take and have equally amongst them, if more than one, the part or share, parts or shares, of and in the said moneys to be raised as aforesaid, which their, his, or her parent respectively would have been entitled to had such parent been then living."

The testator died in March, 1822, and *T. Clubbe*, one of the executors, died in December, 1842, leaving *John Meredith* the sole trustee and executor of the testator's will.

Thomas Orton, the son of the testator, died on the 18th of March, 1855, and *Robert Orton* died on the 1st of January, 1866, neither of them having had any children.

The property was then sold. The five daughters of the testator all survived him, but only one of them, *Elizabeth*, survived *Robert Orton*, the survivor of the two sons.

Martha had issue four children, all living at the death of *Robert Orton*. *Maria* had issue six children, all living at the death of *Robert Orton*; *Jane* died unmarried; and *Mary*, who was the wife of *John Meredith*, the executor, died in 1860. *Mary* had ten children, that is to say, *Margaret*, *John*, and

Anne Jane, who were still living, and seven others, all of whom died in the lifetime of *Robert Orton*, and all except one predeceased their mother, *Mary*. One of them, *Elizabeth Proudlove*, had issue four children, still living; another, *Maria Louisa Elias*, had one child, who survived her, and died an infant in the lifetime of *Robert Orton;* and the other five had no issue.

John Meredith, the surviving trustee, had divided the proceeds of the sale into four parts, and had paid one-fourth to *Elizabeth*, the only surviving daughter of the testator, another fourth part to the children of *Martha*, another fourth part to the children of *Maria*, and the remaining fourth part he had paid into Court under the *Trustees Relief Act*, in consequence of a doubt having arisen as to the portions to which the "children, grandchildren, and issue," of *Mary Meredith*, were entitled under the will of *Thomas Orton*.

Margaret Meredith, the eldest child of *Mary Meredith*, presented this Petition, praying a declaration that the fourth part of the proceeds of the sale, so paid into Court, had become divisible into four equal parts, and that three of such parts were payable respectively to the Petitioner and the other two surviving children of *Mary Meredith*, and the remaining fourth part to the children of *Elizabeth Proudlove*, who were still living.

The representatives of the children of *Mary Meredith* who died in her lifetime, submitted that such children took original and independent interests, and it was not necessary that they should survive the period of distribution in order to take. *Mary's* share was therefore divisible into ten parts, one-tenth being payable to each of the ten children, or to the representatives of such children; and it was contended, on behalf of the four children of *Elizabeth Proudlove* and the child of Mrs. *Elias*, that each of them took an equal share with the children of *Mary Meredith*.

Mr. *Glasse*, Q.C., and Mr. *Freeman*, for the Petitioner:—

The only question in this case arises upon the share which would have gone to *Mary*, one of the five daughters of the testator. The other three shares have been paid over, but *Mary's* share has been paid into Court. Only three children of *Mary* survived the surviving son of the testator, which was the period

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of distribution. Those three will, of course, be entitled to one share each; a fourth child, *Elizabeth Proudlove*, died before the period of distribution, but left four children, who are still living. We say, therefore, that the children of *Elizabeth* are entitled to one share equally with the three surviving children, and that *Mary's* share must therefore be divided into four parts, each surviving child taking one-fourth, and the children of *Elizabeth Proudlove* taking one-fourth between them. The shares vested only in those who survived the period of distribution. The word parent does not mean the first parent only, but it applies to everyone who died leaving children who were in a position to take. The gift over to the grandchildren distinguishes this case from *Holgate* v. *Jennings* (1), reported on appeal *sub nomine Martin* v. *Holgate* (2). The grandchildren cannot take in competition with the children, but must take with them *per stirpes inter se.*

Mr. *Cotton*, Q.C., for the two other surviving children of *Mary Meredith*, in the same interest as the Petitioner.

Mr. *Karslake*, Q.C., and Mr. *Fry* for the children of Mrs. *Proudlove*:—

We take the same view as the Petitioner in contending that only those children of *Mary* are to take who survived the period of distribution, or the representatives of such as may have died before that period, provided such representatives also survived the same period. Therefore the children of Mrs. *Proudlove* who were alive at the death of *Robert*, the surviving son, will be, at any rate, entitled to share with the three children of *Mary*; but we say they are entitled to take each of them an equal share with those children, the gift being to such children, grandchildren, and issue, respectively: *Ross* v. *Ross* (3); *Robinson* v. *Sykes* (4).

Mr. *Baily*, Q.C., and Mr. *Prendergast*, Q.C., for the representative of one of the daughters of *Mary Meredith*, who died before the death of *Robert*:—

This case cannot be distinguished from *Martin* v. *Holgate*, where

(1) 34 Beav. 79. 11 Jur. N.S. 5.
(2) Law Rep. 1 H. L. 175.
(3) 20 Beav. 645.
(4) 23 Beav. 40. 2 Jur. N.S. 695.

it was decided that the gift to children was original, and not substitutional. Each of the ten children of *Mary* took vested interests, whether they died before the period of distribution or not, and the fund should, therefore, be divided into tenths. This question was doubtful at one period, and the decisions were conflicting, as Vice-Chancellor *Kindersley* observed in *Lanphier* v. *Buck* (1), but it was set at rest by the decision of the House of Lords in *Martin* v. *Holgate.*

Mr. *Jemmett,* for the widow of the son of *Mary* who died in the lifetime of his mother before the period of distribution:—

The gift to the children, grandchildren, and issue, was an original gift, and divisible *per stirpes inter se.*

Mr. *Rawlinson,* for the representatives of other children who died before the period of distribution, took the same line of argument, and cited *MacGregor* v. *MacGregor* (2); *Kirkman's Trusts* (3); *Penny* v. *Clarke* (4).

Mr. *Glasse,* in reply.

Dec. 20. SIR R. MALINS, V.C.:—

It was argued, on the part of the Petitioner and the other children of *Mary* who survived the period of distribution, that the fund must be divided among them to the exclusion of all others, on the ground that it was necessary that the children who were to take in place of the parent should survive that period at which the parent, if living, would have become entitled, namely, the death of the surviving son of the testator; and in support of that view numerous authorities were cited, in which eminent Judges have decided that in gifts of this kind it is necessary that the substituted class of children or other issue should survive the period of distribution, in order to take in the place of the person for whom they are substituted; and that remarkable conflict of authority on the point, which is referred to by Vice-Chancellor

(1) 2 Dr. & Sm. 484. (3) 3 De G. & J. 558.
(2) 2 Coll. 192. (4) 29 L. J. (Ch.) 370.

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Kindersley in *Lanphier* v. *Buck* (1), was commented upon. It is, however, unnecessary to go further into this part of the argument, because the point is set at rest by the decision in the House of Lords in *Martin* v. *Holgate* (2), where the gift was to trustees to pay the proceeds to the testator's wife for life, and after her decease to distribute and divide the estate amongst such of his four nephews and nieces as should be living at the time of her decease, but if any or either of them should then be dead, leaving issue, such issue should be entitled to their father or mother's share.

The House of Lords held that the gift to the children was not substitutional, but an original and independent gift, and that it was not necessary that they should survive the period of distribution in order to take. This decision settles the much-vexed question, and obliges me to declare that the fund in question must be divided at least into ten shares, being the number of the daughter *Mary's* children who were either living at the death of the testator or born afterwards.

It was then argued on behalf of the grandchildren of the testator's daughter *Mary*, that they are entitled to take equally with the children, and that the division must consequently be into a greater number of shares, so that an equal share may go to each of the four children of Mrs. *Proudlove*, and a share to the child of *Maria Louisa Elias*. In answer to this, it was argued on behalf of the children of the daughter *Mary* that the grandchildren cannot take in competition with children, but that the children and grand children take *per stirpes inter se*, and this, I think, is the proper construction of the will.

What share, then, would the parent, *Elizabeth Proudlove*, have taken if she had survived the period of distribution? One-tenth—and that, therefore, is the share which her children must take in her place. And in this view of the case I am supported by the decision of the Master of the Rolls in *Ross* v. *Ross* (3), and *Robinson* v. *Sykes* (4). The consequence is that the fund is divisible into ten shares, of which, each of the three surviving children takes one share, the children of *Elizabeth Proudlove* take one-tenth in equal shares; Mr. *Elias* takes one-tenth as the representative of his

(1) 2 Dr. & Sm. 484.
(2) Law Rep. 1 H. L. 175.
(3) 20 Beav. 645.
(4) 23 Beav. 40.

deceased child, who took the share which would have vested in *Mary Louisa Elias* if she had survived the period of distribution; and the legal personal representatives of the five children who died without issue, take one-tenth each.

The costs of all parties must be paid out of the fund, and the residue must be divided accordingly.

Solicitors for the Petitioner: Messrs. *Makinson & Carpenter.*

Solicitors for other parties: Messrs. *Chester & Urquhart;* Messrs. *Hollings, Sharp, & Ullithorne;* Mr. *E. Atkinson.*

M. R.

1866

Nov. 21;
Dec. 7.

D'EYNCOURT *v.* GREGORY.

Tenant for Life and Remainderman—Will—Heir-looms—Fixtures—Tapestry—Pictures in Panels—Statues.

A testator, who was tenant for life of settled estates, on which he had erected, fitted up, and furnished a mansion-house (an old one having fallen into decay), bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at the time of his death, and of which he had power to dispose, to be enjoyed as heir-looms by the persons who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition were not fulfilled. After the testator's death, *A.* became tenant for life of both the settled and devised estates, and on his death the settled estates devolved on *B.*; but (as the condition was not fulfilled) *C.* became entitled to the devised estates and to the heir-looms under the shifting clause in the testator's will. The question arose, as between *B.* and *C.*, which of the articles passed under the will:—

Held, that tapestry, pictures in panels, frames filled with satin, and attached to the walls, and also statues, figures, vases, and stone garden-seats, purchased and placed by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed; but that glasses and pictures not in panels, not being part of the building, passed under the testator's will:

Held also, that articles purchased by the testator, but fixed by *A.* after his death, were not fixtures, and passed under the will to *C.*

GREGORY GREGORY, the testator in the cause, was tenant for life of the estates devised by the will of *George De Ligne Gregory*, on which there was an old manor-house which had not been inhabited for many years. This house was suffered to fall into decay, and the testator erected on the estate, on another site, a new capital mansion-house, called *Harlaxton Manor House*, which he fitted up and furnished at great cost, and resided there till the time of his death. The testator was also owner in fee of certain other estates.

The testator, by his will, dated the 22nd of November, 1848, devised all his own fee simple estates, in strict settlement, to the families entitled to the settled estates under the settlor's will; and he bequeathed to the trustees of his will "all the furniture and linen, tapestry, buhl, marbles, statues, bronzes, ormolu, orna-

mental china and alabasters, plate and plated articles, books, pamphlets, pictures, prints, and drawings, with their frames and glasses, which should be in or about the said manor-house at the time of his death, and of which he had power to dispose;" and directed that the trustees should stand possessed thereof upon trust and to the intent that the same might be attached to the testator's manors and estates before devised, and might go, and be held and enjoyed therewith, as, or in the nature of heir-looms, by the person or persons who should by virtue of his will be entitled to the possession of the same estates, and for such and the like estates as long as the nature of the property and the rules of law and equity would permit. The testator directed that if any of the persons thereby made tenants for life, or any issue of such persons should, under the will of *George De Ligne Gregory*, become entitled to an estate tail in possession in the hereditaments by the last-mentioned will devised, then the person so becoming entitled should, within twelve months after attaining the age of twenty-one, resettle all the hereditaments devised by the will of *George De Ligne Gregory*, so that the same might be held to the same uses and upon the same trusts as were by his (the testator's) will declared concerning the hereditaments and chattels therein comprised: and in case any person so entitled should not within twelve months make such resettlement as before required, then and in such case all the hereditaments thereby devised, and the articles thereby made heir-looms, should thenceforth go and remain to such uses, and upon and for such trusts and purposes, as the same would have gone and been held if they had not been limited to the person or persons so neglecting or refusing to make such resettlement.

The testator died in 1854, and on his death *George Gregory* became tenant for life of the devised estates under his will, and also of the settled estates under the will of *George De Ligne Gregory*.

In 1860, *George Gregory* died, and *John Sherwin Gregory* became tenant for life under the will of the testator, *Gregory Gregory*, and tenant in tail in possession under the will of *George De Ligne Gregory*.

In February, 1861, *John Sherwin Gregory* executed a deed-poll, whereby he declared that he elected not to settle, and that he refused to settle the hereditaments, heir-looms, and other premises

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devised and bequeathed by the will of *George De Ligne Gregory* in manner required by the acts of the testator, *Gregory Gregory*, and thus renounced and disclaimed all devises and bequests given to him by the will of the testator, *Gregory Gregory*.

On the execution of this deed-poll, the shifting clause in the testator's will took effect in favour of Sir *Glynne Gregory* as the next person entitled under the limitations contained in the will.

The greater part of the heir-looms bequeathed by the testator's will were placed in the house by the testator while tenant for life of the settled estates, and some of them were placed there after the testator's decease by *George Gregory*.

The suit was instituted by the surviving trustee of the testator against *John Sherwin Gregory*, Sir *Glynne Gregory*, and others, as Defendants, to obtain the declaration of the Court as to the rights of all parties under the said will, and (among other things) to the heir-looms before mentioned.

The articles on which the principal questions arose, as between the Defendant, Sir *Glynne Gregory*, who claimed them under the will of the testator, and the Defendant, *John Sherwin Gregory*, who, as tenant in tail of the settled estates, including *Harlaxton Manor House*, claimed these articles as fixtures, were, so far as is material for the present report, the tapestry in the gallery and another room in the mansion-house put up by the testator; certain pictures fixed by the testator in panels; gilt frames in the walls filled with satin; chimney-glasses; certain kneeling figures and marble vases in the hall of the mansion; stone figures of lions at the head of a flight of steps, and sixteen ornamental stone seats in the garden. There were also tapestries and other articles purchased by the testator and fixed by *George Gregory* after his decease, and some which were both purchased and fixed by *George Gregory*.

By an order made in the cause on the Petition of the Defendant, Sir *Glynne Gregory*, the following inquiries were directed:—

First: whether any, and which, of the furniture, tapestry, marble, &c. (therein mentioned), were affixed or fastened to the mansion-house, or its appurtenances, by *Gregory Gregory*, and in what manner, and when, and under what circumstances. Secondly: an inquiry whether any, and which, of the said articles were so fixed or fastened

by *George Gregory*, and when, and in what manner, and under what circumstances.

The Chief Clerk made a certificate answering these inquiries, and shewing how the articles in question were situated. Those respecting which no question could arise were delivered up, and the case now came before the Court on further hearing with respect to other articles, including those before mentioned.

Evidence was adduced on both sides, and the affidavit of *A. Johnston*, a carver and decorator, given on behalf of Sir *Glynne Gregory*, which was referred to in the judgment, contained the following description of the principal articles in question:—

"The portrait in oil of Lady *Williams* in the great hall on canvas and stretcher appears to be screwed by nails or screws to blocks or plugs of wood inserted in the brickwork of the room: a wood moulding is placed upon the front of the picture, one portion of such wood moulding being next the picture, and the other flush with the wainscoting of the room, and such wood moulding is attached by screws or nails to wood plugs in the wall; a wood frame is placed over such moulding, and attached thereto and to the wainscoting of the room by screws or nails: the screws, or nail heads, have afterwards been stopped and gilded with the frame. This painting and gilt frame can be removed easily, and without damage, and if the painting were removed and the framework filled in with figured satin, in the same manner as are all the other panels in this room, it would be a counterpart of them, the moulding round the painting being exactly similar to those which are round the satin lined panels.

"The tapestries" (giving a description) "are each on wood stretchers attached by screws or nails to blocks or plugs of wood inserted in the brick wall in a similar manner to that described with regard to the portrait, this being the usual and common method of securing glasses, pictures, tapestries, &c., where the walls are recessed; painted wood mouldings have then been placed round the face of such tapestry flush with the wood wainscoting or panelling of the room, and the nails or screws have been afterwards stopped in and painted over these mouldings, and the tapestries can be very easily removed, and the mouldings replaced, if required, without material damage to the walls or panelling of the

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room. The room has enriched panels in the style of *Louis Quatorze*, painted blue and white, and if the panels from which it is desired to remove the tapestries were ornamented in the same style, it would make a perfectly complete apartment, as far as these walls are concerned.

"The chimney-glass in an ornamental white and gilt frame, and an oil-painting surmounting it, are placed against the flush face of the wall, and attached with nails or screws as an ordinary looking-glass would be fixed, and can be easily taken down. This glass frame and picture frame are made of wood ornamented with plaster or composition enrichments, and bear no evidence of being attached to the wall but by screws or nails.

"The carved and gilt frames, filled with white satin, occupy the side of a room, and are placed against the flush face of the wall, and attached to it with nails or screws, and may be removed with ease without damage.

"The three carved kneeling figures in the great hall are placed upon three pedestals forming parts of the cedar staircase. They are formed of cedar, and are hollow, and the figures, where attached to them, are hollow, and are so attached by a few screws only. The figures were evidently not designed to rest upon the particular pedestals which they now occupy, as the plynths of the figures and the tops of the pedestals do not accord in their proportions. The figures could easily be lifted off the pedestals without damage.

"The sculptured marble vases" (in the hall) "have the appearance of resting upon massive cedar pedestals, but upon close inspection the cedar work is merely a casing built round the real supports or piers upon which the vases stand, which, being of great weight, rest upon piers, probably of brickwork, the cedar casing being cut, and fitted round the bases of the vases. The great weight of these vases renders the use of mortar, cement, or other material, wholly unnecessary for the purpose of attaching them to the pedestals, and the same are not fixed or fastened in any manner save by a beading of cedar wood, and could be lifted off the pedestals without damage to the freehold, and the pedestals would only require new tops to render them fit to receive any other objects that might be placed on them.

"The pair of lions three feet high" (at the head of the flight of

steps in the garden) "are of sculptured marble, and of very great weight, and are simply resting on stone pieces or pillars, and have no appearance of being attached, which would be unnecessary, their own weight being sufficient to prevent their being displaced, and I believe the said lions can easily be lifted off, with proper appliances, without damage to the said stone piers.

"The stone garden-seats are stone marble slabs of great weight, each resting on three stone supports or uprights sunk a short distance through the earth, but the seats or slabs do not appear to be in any manner fixed or attached to their said supports, but are retained in their proper position solely by their own great weight, and can easily be lifted off the supports without any damage to them or the supports."

Sir *Roundell Palmer*, Q.C., and Mr. *Jessel*, Q.C., for the Petitioner, Sir *Glynne Gregory* :—

The object of the testator, who had built the new mansion-house on the estate of which he was tenant for life, and had fitted it up in a very costly way, was this—that all the articles which he had purchased as fittings and ornaments of the house, should go as heir-looms with his own estates in strict settlement. *John Sherwin Gregory*, who was tenant for life of the settled estates, and also of the estates devised by the will, elected not to resettle the property, and consequently the clause of forfeiture took effect in favour of the Petitioner, who thus became tenant for life of the devised estates and of the heir-looms, so far as they could lawfully pass under the testator's will. The question is, what articles are not fixtures, and, therefore, pass under the gift in the will? We contend that they are those articles which were not *de facto* fastened to the freehold, and those which can be separated from it.

With respect to the right of the executor of a tenant for life, as against the remainderman, to fixtures set up for ornament or convenience, it is stated in *Williams* on Executors (1), that though "not a single case is to be found in the books relating expressly to this subject, nevertheless, upon the ground that the law is more favourable in this respect to the executor of tenant for life, than to the executor of tenant in fee, it is clear *à fortiori*, that all cases

(1) 6th ed. p. 701.

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which support the right of the latter to hangings, pier-glasses, tapestry, pictures, &c., are express authorities in favour of the right of the former." The authorities shew that, where chattels of that kind can be removed without material injury, then the right of the executor of the tenant for life will prevail as against the heir of the tenant in fee. As between a tenant for life and remainderman, you cannot presume an intention on the part of a tenant for life to dedicate such chattels for the benefit of the inheritance where he has given them by his will, and they are separable from the freehold without occasioning special damage. Where a tenant for life puts up furniture or ornaments, and does not deal with his interest wrongfully, he cannot be taken to have been acting for the benefit of the estate. Questions of this kind, with regard to trade fixtures, are considered in *Amos* on Fixtures (1). In *Lawton* v. *Lawton* (2), where a fire-engine (a steam-engine) erected in a colliery by a tenant for life, was held to be personalty, and to go as assets to his executor, and not to the remainderman as part of his real estate, Lord *Hardwicke* observed (3): "This is not a case between an ancestor and heir, but an intermediate case between a tenant for life and remainderman;" and added, "In the reason of the thing, the situation of the tenant for life comes near to that of a common tenant, where the good of the public is the material consideration . . . . These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion." Though the element of trade entered into that case, yet similar principles apply here, for it is advantageous for property generally that a tenant for life should furnish his house, and not be discouraged by the possibility of the whole benefit going to the remainderman. *Lord Dudley* v. *Lord Warde* (4) was a similar case, and governed by the same principles. On the question of fixtures for ornament, "the articles which an executor of a tenant in fee has been held entitled to take as part of his personal estate, consist merely of hangings, glasses, and tapestry nailed to the walls of a house, furnaces, grates, iron backs to chimneys, and such like. These instances, therefore, establish an indulgence extending to things which subsist as complete chattels in them-

(1) 2nd ed. p. 123.
(2) 3 Atk. 13.
(3) 3 Atk. 16.
(4) Amb. 113.

selves, and which, having been put up as mere ornamental furniture, or for temporary domestic convenience, are not united to the fabric of the house by any permanent or substantial annexation," *Amos* on Fixtures (1). In *Squier* v. *Mayer* (2), it was held that hangings nailed to the wall belonged to the executor, and not to the heir. But in the subsequent case of *Cave* v. *Cave* (3), pictures put up instead of wainscot, were held to go to the heir, and not to the executor. Later cases, however, rather agree with *Squier* v. *Mayer*, than with *Cave* v. *Cave*. Thus in *Harvey* v. *Harvey* (4), a case recognised by Mr. Justice *Buller*, in his Law of *Nisi Prius* (5), hangings and tapestry were held to belong to an executor, who recovered accordingly against the heir.

Applying these principles to the tapestry, and to the pictures in panels, we submit that they are not fixtures, and pass under the testator's will. The old cases between the executor and the heir, where the Court leans in favour of the heir, have no application to questions between a tenant for life, who is absolute owner of the chattels, and a remainderman. The tapestry was never a part of the house, and a picture, whether painted on canvas or not, is not a fixture because it is placed in a panel. There is no authority for saying that they belong to the remainderman, and as the tenant for life could not have been restrained by this Court from removing them in his lifetime, he can dispose of them by his will. The same observations apply to the frames filled with satin, and to the glasses, which are shewn by the evidence to be easily removable.

The marble vases, the kneeling figures, the lions, and the stone garden seats, all stand by their own weight, and cannot be said to be fixtures. In *Hutchinson* v. *Kay* (6), it was held that looms in a mill which were not fixed, but steadied by iron legs let into the floor, were not fixtures, and that they consequently did not pass under a mortgage of the mill and machinery belonging to it.

Mr. *Field*, Q.C., and Mr. *Welby*, for other Defendants in the same interest as the Petitioner:—

The marble vases, and garden-seats which simply rest by their

(1) 2nd ed. p. 138.
(2) 2 Freem. 249.
(3) 2 Vern. 508.
(4) 2 Str. 1141.
(5) Page 34a.
(6) 23 Beav. 413.

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own weight, are not fixtures, and even if cement is used, that cannot alter their character. In *Horn* v. *Baker* (1), on a question of what articles in a distillery were in the order or disposition of a bankrupt, vats standing on the surface were held to pass to the assignees. So in *Mather* v. *Fraser* (2), articles standing merely by their own weight did not pass as fixtures in the mortgage of a manufactory.

In *Davis* v. *Jones* (3), where parts of a machine had been put up by a tenant, and were capable of being removed without injury to the rest of the machine, or to the building, they were held to belong to him on the expiration of his term. The older cases on this subject were decided at a time when, through the influence of the feudal laws, much greater respect was paid to real than to personal property. The later cases have modified the old maxim, *Quicquid plantatur solo solo cedit.* As between landlord and tenant such articles would, at the close of the demise, belong to the tenant: *Elliott* v. *Bishop* (4) (in error, *Bishop* v. *Elliott* (5).) In *Wiltshear* v. *Cottrell* (6) a granary, resting by its own weight on staddles built into the land, was held not to be a fixture. This case applies to the garden seats, which rest on the ground by their own weight.

The articles belonging to the testator, and fixed by *George Gregory* after his decease, likewise pass under the will.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *W. Knox Wigram*, for the Plaintiff.

Mr. *Mellish*, Q.C., Mr. *Selwyn*, Q.C., and Mr. *J. L. Bird*, for *John Sherwin Gregory*, the tenant in tail of the settled estates:—

The case has been argued as if it were an ordinary question between a tenant for life and remainderman as to the right to fixtures. But the case is wholly different. There was on this estate an old manor-house, in place of which the testator erected on the estate a house on another site, on a much larger scale, and allowed the old house, for which he was impeachable for waste, to

(1) 9 East, 215.
(2) 2 K. & J. 536.
(3) 2 B. & A. 165.
(4) 10 Ex. 496.
(5) 11 Ex. 113.
(6) 1 E. & B. 674.

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go to ruin. The new house, with everything in it, must be taken to be in substitution for the old one; and Sir *Glynne Gregory* has no more right under the testator's will to remove fixtures from the new house than he would have had to remove them from the old house if it had been standing. When a tenant for life builds a house in substitution for another, the articles of furniture or ornament placed in it are not to be regarded in the same light as these which are placed by a tenant for life in a house in addition to those already there. Where a tenant for life, or tenant for years, brings in his own ornamental fixtures, which can be removed leaving the house substantially the same as before, then undoubtedly they belong to him: But supposing there were in this case any tapestry which had descended to the tenant for life, as part of the inheritance, and he chose to remove it, and to substitute other tapestry much more valuable, then he would have no right to remove it, as it would be presumed that he intended it in substitution for that which was part of the inheritance. In like manner the whole of the new manor-house, with everything it contains, must be taken to be in substitution for the former one.

As to the articles themselves, the lions, the vases, and the stone garden-seats, formed part of the original design of the house, and are therefore irremovable. Those articles which, however fixed, formed part of the building, belong to the same class. The words of the will expressly point to articles in or about the manor-house, or personal chattels. Under these words nothing would pass which was part of the building, or in any way fixed to it, even though it were of such a character as an ordinary tenant for life would be entitled to remove. The tapestry fixed by the testator was so fastened as to be properly a part of the room, and he cannot be assumed to have intended to leave the room in an uninhabitable state by its removal.

In such cases it is always necessary to inquire in what position the tenant for life who placed the articles stood to those entitled in remainder. If his position were such that he evidently intended the things to remain there, and the remainderman would be injured by the removal, then the Court will presume an intention that they were not to be removed. In *Wood* v. *Hewitt* (1),

(1) 15 L. J. (Q. B.) 247.

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where the question was, whether a chattel placed by the owner upon the property of another, but severable from it, had become part of the freehold, Lord *Denman* observed that the case of *Mant* v. *Collins* (1), there cited, might be taken to be law to this extent, that it must be matter of evidence how such a thing came where it was, and whether it belonged to the freeholder or not.

As regards the articles purchased by the testator, but fixed by *George Gregory* so as to become part of the house, although there may be a right of action against the estate of *George Gregory*, they cannot be removed by the Petitioner. In *Brooke's* Abridgment, as cited in *Amos* on Fixtures (2), it is laid down that, "If a piece of timber which was illegally taken from *J. S.* has been hewed, trespass does not lie against *J. S.* for retaking it. But if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed, for by annexing it to the freehold it becomes real property." There were other articles purchased by *George Gregory* and fixed by him: as to these, he must be presumed to have dedicated them to the house.

Mr. *Jessel*, in reply:—

There is no evidence in this case that the new manor-house was built in substitution for the old one which had fallen into decay before the testator became tenant for life. As regards the tapestry it is expressly included in the will; as regards the other articles, the presumption is against dedication by the testator for the benefit of the estate. According to *Paton* v. *Sheppard* (3), they would pass by the will under the word "furniture."

Dec. 7. LORD ROMILLY, M.R.:—

The question which arises upon this Petition is, what were the articles which the testator could dispose of. The case arises thus:—

The testator, Mr. *Gregory Gregory*, who died in June, 1854, was

(1) Not reported: Trinity Term, 1842. (2) 2nd ed. p. 13.
(3) 10 Sim. 186.

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the tenant for life of certain estates, under the will of *George De Ligne Gregory*, and was also tenant in fee simple of certain other estates. He then made his will, by which he devised his fee simple estates in strict settlement to the same persons as those to whom the settled property would pass; and he gave to his trustees by enumeration all the articles he had the power to dispose of, and which he desired might go as heir-looms with the property, as far as the rules of law and equity would permit. He then inserted a shifting clause, providing that if any tenant in tail in possession of the estates taken under the will of *George De Ligne Gregory* (which I call the settled estates) should not, within twelve months after becoming so entitled, re-settle those estates, and all the property and heir-looms derived under the will of *George De Ligne Gregory*, in such a manner as to go according to the limitations of the estates comprised in the will of *Gregory Gregory* (which I call the devised estates), then the devised estates, and all the articles thereby made heir-looms, were to go in the same manner as if the limitations in favour of the person neglecting or refusing to make such settlement had not been inserted in his will.

Upon the death of *Gregory Gregory*, *George Gregory* became the tenant for life of both the settled and the devised estates. He died in 1860. Upon his death, the Defendant, *John Sherwin Gregory*, became the tenant for life of the devised estate under the will of *Gregory Gregory*, and tenant in tail male in possession of the settled estates under the will of *George De Ligne Gregory*. In February, 1861, *John Sherwin Gregory*, by deed-poll, declared his intention not to comply with the directions contained in the will of *Gregory Gregory* for the re-settlement of the settled estates, and accordingly the shifting clause took effect in favour of the Defendant Sir *Glynne Gregory*, and thereupon the question arose, what were the articles contained in the gift of heir-looms in the will of *Gregory Gregory* which he had power to dispose of?

The testator had built, on a large and magnificent scale, the manor-house of *Harlaxton*, in *Lincolnshire*, and had partially furnished it. The words of the bequest are these:—[His Lordship then read the words of gift of the heir-looms.]

In the first place, I think it is obvious that the testator, by the shifting clause, meant to coerce as powerfully as he could the

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tenant in tail in possession of the settled estates, and to induce him to re-settle those estates, and, in the event of his refusing to do so, the testator intended to take away from him every article of property he could. To determine what those articles are, this suit was instituted. [His Lordship then referred to the order, and the inquiries thereby directed, and the Chief Clerk's certificate.]

The principal question is, which of the articles more or less closely attached to the house are removable, and which are not removable; and with respect to them, I have felt, and do feel, very considerable difficulty. I cannot adopt the specious and ingenious argument of Mr. *Mellish*, that as *Gregory Gregory* was tenant for life, impeachable for waste, and has allowed the old house to fall down, he must be held to have substituted the new house for the old one, with everything that there was in it, and all its attributes, whether movable or immovable. Assuming that the heir in tail could have obtained an injunction to restrain *Gregory Gregory* from committing permissive waste by allowing the old house to fall into decay, it is clear that the substitution of a new house in another place would be no answer to any such injunction, and it is also clear that no such exchange as that of one house for another could be made so as to bind persons in succession. Still less could any such exchange be implied, nor, if implied, could it extend to the articles which personally belonged to *Gregory Gregory*, and which he would have power to dispose of as he pleased. I must also disregard all the additions made by the next tenant for life, *George Gregory*, who has affixed to the freehold several articles belonging to and left by *Gregory Gregory*. All the articles, such as tapestry, marbles, and the like, which belonged to *Gregory Gregory*, and which remained detached at his death, were part of his personal chattels, and the next tenant for life could not, by attaching them to the freehold, even although on his death he was carrying into effect the wishes and intentions of *Gregory Gregory*, diminish or qualify the effect of the shifting clause, or turn mere loose personal chattels belonging to *Gregory Gregory* into fixtures inseparably attached to the freehold, and thereby prejudice his successors, or affect their rights.

It is not, therefore, on any or either of these two points that

I have felt any difficulty, but what I have felt embarrassed by is the more or less of connection (using that word in its extended sense) with the freehold, and with the house and grounds, which is to be observed in the articles which were affixed by *Gregory Gregory* himself.

The first of these which I think proper to mention is the tapestry which was put up by the testator, *Gregory Gregory*, himself. It is clear that the testator could not have disposed of paper affixed to the walls, nor, if he had used silk instead of paper for lining the walls, could he, in my opinion, have removed the silk. So, if the testator had covered the walls of the house with panelling, he could not, in my opinion, have removed the panelling, and have left the walls bare. If he caused them to be painted in fresco, he could not have removed the paintings, and I think if he had caused the panels to be painted he could not have removed the painting any more than if he had put in panels already painted, and fixed them close to the wall. In all these cases I think they must be considered to be fixtures not removable by the tenant for life.

Upon considering the case of the tapestries already fixed at the death of *Gregory Gregory*, I have come to the conclusion that these fall within the description of such matters as those I have just enumerated, and that they could not be removed; in other words, that the testator himself could not have been allowed to remove them. [His Lordship then read from *Johnston's* affidavit the description of the mode in which the tapestries were fastened.] Although this is not as complete as if the tapestries were actually affixed to and inseparable from the walls themselves, which, I apprehend, is never done, still I think they must be treated as part of the wall itself, and by so placing them Mr. *Gregory Gregory* deprived himself of the power of removing them. In the same class with these tapestries is the portrait of Lady *Williams*. [His Lordship then read the description.] The observation that "the painting and gilt frame may be removed easily and without damage, and if the painting were removed, and the framework were filled in with figured satin in the same manner as all the other panels in the room," is, in my opinion, very pregnant. Both the painting and the tapestries could be removed unquestionably in this sense, that they could be taken down, and the space left or filled with satin, and

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so likewise the satin in the frames could be taken down, and the gaps replaced by paper, in the same manner as the tapestry might be replaced with satin; whereas the paper, being stuck close to the wall, could not be removed: but, in my opinion, in all these cases, whether it is the paper, or the satin, or the panels, or the tapestry, they are all part of the wall itself, and they are fixtures not to be removed. In all these cases the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding-stone of a flour-mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir, and not to the legal personal representative. The chimney-glass, and the ornamental frame, and the oil-painting surmounting it, appear to me to be no part of the house itself, or of the wall itself, but to be merely ornaments attached to it which the testator might have removed. The carved and gilt frames filled with blue and white satin, as I understand the evidence, fall exactly in the same category as the tapestry, and are, in fact, instead of what is usually paper, a covering of the walls, and form part of the walls themselves.

With respect to the carved kneeling figures on the staircase in the great hall, and the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design for the hall and staircase itself, and put in there as such, as distinguished from mere ornaments to be afterwards added. There may be mansions in *England* on which statues may be placed in order to complete the architectural design as distinguished from mere ornament; and when they are so placed, as, for instance, they are in the cathedral of *Milan*, I should consider that they could not properly be removed, although they were fixed without cement or without brackets, and stand by their own weight alone. In such a case they resemble the stone of a mill, which is part of the mill itself, and goes to the heir-at-law. I admit that the distinction between such statues as are added by way of ornament, and such as belong to

an architectural design, and form part of the design itself, is extremely thin, and that in many cases it would be difficult to distinguish them, unless it were done in an arbitrary manner, so closely might one run into the other. But I am unable to suggest any other mode by which the true construction can be defined more accurately than that which I have already stated. Accordingly evidence must in every case determine whether the article falls within or without the line. In the present case I have thought the articles which I have mentioned are not removable, relying upon the evidence given and the drawings laid before me. The same rule will apply to the lions at the head of the flight of steps in the garden, and the sixteen stone garden-seats in the garden itself. These, in my opinion, must go with the estate, and are not separable as mere loose personal chattels.

Unquestionably, in coming to these conclusions, I have not done so with any degree of confidence, or even of complete satisfaction to myself. The evidence, minute and clear as it is, cannot give the same effect that a personal examination might do; but even on a personal examination I should doubt whether I could come to a more accurate conclusion. The best conclusion I can come to with regard to the articles I have enumerated, is, that they seem to me to belong to the freehold, and to be inseparable from it. All the rest are, in my opinion, removable, and belong to the personal estate. I repeat that *George Gregory* could not convert the chattels of the testator into fixtures; and the tapestry belonging to the testator which he has attached to it must be removed, and restored to the personal estate of *Gregory Gregory*. Having come to this conclusion, I consider myself bound to hold that *Gregory Gregory* meant, in the event of the refusal to re-settle, which has occurred, to give away from *John Sherwin Gregory* every part of the furniture or fixtures which the law would allow him to dispose of.

Solicitor for the Plaintiff: Mr. *C. E. Withall.*

Solicitors for Sir *Glynne Gregory:* Messrs. *Bolton & Grylls Hill,* agents for Mr. *Beaumont, Grantham.*

Solicitor for the other Defendants: Mr. *H. P. Bird.*

M. R.

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Feb. 8, 11, 14.

SEAGRAM *v.* KNIGHT.

Waste—Timber—Tenant for Life and Remainderman—Statute of Limitations—Delay—Acquiescence.

If a tenant for life, impeachable for waste, cuts timber, and converts the proceeds to his own use, although the timber is such as the Court, if applied to, would order to be cut, the *Statute of Limitations* begins to run against the right of the remainderman to recover the proceeds of the timber from the time of the cutting, and not from the death of the tenant for life.

In 1831, *A.*, tenant for life, impeachable for waste, with remainder to his son, *B.*, an infant, in fee, cut timber and received the proceeds. *B.* came of age in 1834, lived with, and was in partnership with, *A.* for some years, and died intestate in 1844, leaving *C.* his only child. *A.* died in 1864, *C.* came of age in 1865, took out administration to *B.*, and in 1866 filed a bill against *A*'s executor for an account of the proceeds of the timber:—

Held, that the right of suit accrued to *B.* in 1834, and, consequently, that *C.*'s claim as his representative was barred by the statute:

Held, also, that independently of the statute, the Court would presume that *B*'s claim had been settled between him and *A.*

Varied as to summary of Ref. Lunacy 6 Ch. 2 Ch. 638

TIMOTHY LACY, who died in May, 1830, devised freehold lands to *W. F. Seagram* for life, with remainder to his son, *W. Lye Seagram*, in fee.

In 1831, *W. F. Seagram* cut down and sold timber on the devised estate to the amount of £520, *W. Lye Seagram* being at that time under age, and living with his father. *W. Lye Seagram* came of age in 1834, and lived with, and was maintained by, his father until 1843, when he married. In 1837, *W. F. Seagram*, who was a surgeon, in partnership with another person, paid his partner £750 to withdraw from the business, and took *W. Lye Seagram* into partnership with him without any premium. In 1842, 1843, and in March, 1844, *W. F. Seagram* cut down and sold timber on the devised estate. On the 1st of April, 1844, *W. Lye Seagram* died intestate, leaving the Plaintiff his only son and heir, and *W. F. Seagram* took out administration to his estate during the Plaintiff's minority. *W. F. Seagram* cut and sold some more timber after the death of *W. Lye Seagram*. In November, 1864, *W. F. Seagram* died. In March, 1865, the Plaintiff came of age, and in March, 1866, having taken out administration to his father's

estate, he filed the bill in this suit against the executor of *W. F. Seagram* for an account of all moneys received by *W. F. Seagram* in respect of timber cut on the devised estate during the life, and since the death, of *W. Lye Seagram*, and for payment to the Plaintiff of such moneys, with interest from the death of *W. F Seagram*.

The Defendant, before putting in his answer, offered to account for and pay to the Plaintiff the produce of the timber cut after the death of *W. Lye Seagram*, with interest from the death of *W. F. Seagram*, and the costs of the suit up to the date of the offer, but the Plaintiff declined the offer.

The answer admitted that all the timber cut by *W. F. Seagram* was ripe for felling when so cut, and such as the Court, if applied to for that purpose, would have ordered to be cut. It also stated that, during the time *W. Lye Seagram* was in partnership with his father, they frequently settled accounts together, and he never made any claim in respect of timber or moneys received from the sale thereof, and submitted that it must be presumed that an arrangement had been made between him and his father as to the application of the proceeds of the timber. It also claimed the benefit of the *Statute of Limitations*.

The testator's books contained entries of the receipt of the moneys arising from the sale of the timber from time to time, among the receipts of rent and other money derived from the devised estate.

Mr. *Selwyn*, Q.C., and Mr. *Wickens*, for the Plaintiff:—

The cutting of timber which is ripe for cutting, and such as the Court would direct to be cut upon an application by the tenant for life, is proper, and the proceeds form part of the settled estate, and the tenant for life, though impeachable for waste, is entitled to the income: *Gent* v. *Harrison* (1); *Bagot* v. *Bagot* (2); consequently the right of the remainderman to the capital of such proceeds does not accrue until the death of the tenant for life: *Harcourt* v. *White* (3). If *W. F. Seagram* had invested the proceeds of the timber for the benefit of the estate, as he ought to have done, the fund would have been affected with a trust which could not have

(1) Joh. 517: 9 Jur. N.S. 1286. (2) 32 Beav. 509: 9 Jur. N.S. 1022. (3) 28 Beav. 303: 6 Jur. N.S. 1087.

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been destroyed by any subsequent act on his part, and his estate cannot derive any advantage from his omission to make such investment. The right, therefore, of the Plaintiff, as representative of his father, is not barred by the *Statute of Limitations*. Neither can the Court presume that the Plaintiff's father acquiesced or waived his right to this money. There can be no acquiescence or waiver without the fullest knowledge of the right waived; but here the principal cutting of timber took place during the infancy of the Plaintiff's father, and there is no evidence that he knew either that *W. F. Seagram* was impeachable for waste, or that the money had not been invested. It would be a most mischievous doctrine, tending to injure the peace of families, if this Court were to hold that when a father, tenant for life, impeachable for waste, cuts timber, though the cutting is for the benefit of the estate, if the son entitled in remainder does not immediately institute a suit to have the timber money secured, he must be taken to have given up the *corpus* as well as the income to his father.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, for the Defendant:—

The cutting of the timber by *W. F. Seagram* was a tortious act, and his son, as remainderman in fee, could immediately have brought trover, or sued for an account: *Whitfield* v. *Bewit* (1); *Bewick* v. *Whitfield* (2); *Perrot* v. *Perrot* (3); *Bateman* v. *Hotchkin* (4). A tenant for life, impeachable for waste, cannot cut timber properly, although the Court would, upon a proper application, have ordered it to be cut. If *W. F. Seagram* had invested the money, and declared himself a trustee of it for the benefit of the successive owners of the estate, lapse of time would not have destroyed the Plaintiff's right: *Phillipo* v. *Munnings* (5); but it appears from his books that he always treated the money as his own. The right, therefore, which the Plaintiff now seeks to enforce, accrued, as to the timber cut in 1831, upon his father attaining twenty-one, and as to that cut in 1842, 1843, and 1844, at the time of the cutting, and is barred by statute. In *Bagot* v. *Bagot* (6) the remainderman was an infant when the bill was filed. In *Gent* v.

(1) 2 P. Wms. 240
(2) 3 P. Wms. 267.
(3) 3 Atk. 94.
(4) 31 Beav. 486.
(5) 2 My. & Cr. 309
(6) 32 Beav. 509.

Harrison (1) it was held that, if the cutting had been wrongful, the bill must have been dismissed. The Plaintiff is also barred by his father's acquiescence; this Court will not entertain stale demands: *Harcourt* v. *White* (2); and, after this lapse of time, it must be presumed that *W. Lye Seagram*, who was living with his father in 1831, and who lived with him free of expense for nine years after he attained twenty-one, and was admitted into a profitable business at his father's expense, and frequently settled accounts with him, but never made any claim on account of the timber, knew and acquiesced in the receipt of the proceeds by *W. F. Seagram* for his own benefit. The right of the Plaintiff is only to have an account of the timber cut after his father's death, and, as this was offered before answer, he must pay the costs subsequent to that offer.

Mr. *Selwyn*, in reply:—

In many of the cases the whole question in dispute has been, whether the cutting of timber by a tenant for life, impeachable for waste, was in the particular case proper or wrongful. The Court will treat as properly done that which it would have ordered to be done; the burden, no doubt, is upon the person who has done the act of shewing that it would have been so ordered; in this case that is admitted by the answer. That being so, *W. F. Seagram*, who was accountable for the money, was also entitled to the income, and during his life the statute did not run: *Burrell* v. *Earl of Egremont* (3). As to acquiescence, the more reasonable presumption is, that *W. Lye Seagram*, knowing his father to be a solvent person, agreed to leave the money in his hands during his life rather than incur the expense of a suit to have it secured.

Feb. 14. LORD ROMILLY, M.R.:—

This is a suit instituted by a grandson against his grandfather's legal personal representative, to obtain payment out of his grand-

(1) Joh. 517. 5 Jur. N.S. 1285. (2) 28 Beav. 303. 6 Jur. N.S. 1087
(3) 7 Beav. 205.

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father's estate of the money obtained by him during his lifetime by felling timber when he was tenant for life, impeachable for waste.

[His Lordship then stated the facts, and continued :—]

The question is, whether after this lapse of time the Plaintiff can require the grandfather's executor to account for the money which he received. If there is any trust, he unquestionably can; if there is no trust, if it was a wrongful act by the grandfather, then the *Statute of Limitations* will have run, and will have barred the right of the Plaintiff.

The manner in which the Plaintiff seeks to make out the trust is this: he says, at maturity timber may properly be cut by the tenant for life, although he is impeachable for waste, with this condition, that the produce must be invested upon the same trust as that upon which the estate was held, and that the tenant for life is entitled to take the interest of the money. Unless the cutting is sanctioned by the Court of Chancery, I am disposed to think that it is a wrongful act; it is difficult to ascertain whether the timber had arrived at maturity or not; the tenant for life makes himself the sole judge of that—he does it without authority. If he had done it with authority, or if he had invested the produce of the timber, and treated it as a trust fund, in which case a trust would have arisen, then I entertain no doubt that he would have constituted himself a trustee for the persons entitled to the estate, and that no time would have been any bar to the right of recovery against him. But it appears from his books that he did not do so; he treated the money as his own, and dealt with it as if he were the absolute owner of it, as he did with the other produce of his estate.

Now, it is to be observed in this case that the estate is limited, after the estate for life, to the Plaintiff's father in fee. If it had been limited to him in tail a very different question would have arisen, because then he could not have disposed of his interest in remainder after the estate for life without executing a disentailing deed, which he did not do; but as it was, the Plaintiff's father, being tenant in fee, was the absolute owner of the capital of this money, subject to the life estate of the Plaintiff's grandfather therein. I think, therefore, I must treat this exactly as if the Plaintiff's father were now asking for the money. The Plaintiff

can only claim through his father; but if the father were Plaintiff, the question would be, "Why is it you have come so late, and what proof do you offer of being ignorant of the fact of this timber being cut, and of the wrongful act of your father; and why did you wait till after the death of your father?" And what makes it much more strong is, that they had been living together as partners until within a short time of the death of the Plaintiff's father; and this is money which may have been taken into account, and the question may have been settled between them. The only persons who could answer these questions are now dead; every presumption, therefore, in my opinion, must be made in favour of time in such a case. On the part of the Plaintiff personally, unquestionably there is no *laches;* but if he can only claim through his father, he must stand exactly in the same position as if the father were here making the claim.

I think that time must be considered to have run from the period when the Plaintiff's father attained the age of twenty-one years, and that the claim is barred by the statute. I am also of opinion that, even if the statute had no application to this case, on the ground of the lapse of time, and of the necessity of making every reasonable presumption in favour of the estate of the grandfather, I must consider that this claim, whatever it is, was settled between the grandfather and the father during their lifetime, and that the Plaintiff cannot now make any claim for an account against his estate for timber which was cut before his father's death. He is entitled to an account of the money received for timber cut since the 1st of April, 1844; and if the parties cannot agree upon the amount of it, I shall direct an account to be taken of what the amount is, and direct payment accordingly. But as this was offered before the answer was put in, I accede to the argument that the Plaintiff should pay the costs from the time when the offer was made, up to, and including, the hearing. The bill must be dismissed so far as it seeks an account of the money received in the lifetime of *W. Lye Seagram.*

Solicitors for the Plaintiff: Messrs. *Underwood & Colman*, agents for Messrs. *Seagram & Wakeman, Warminster.*

Solicitors for the Defendant: Messrs. *Loftus, Vizard, Crowder, & Anstie*, agents for Messrs. *Chapman & Ponting, Warminster.*

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Jan. 16, 18.

OLDHAM *v.* OLDHAM.

Clause of Forfeiture—Life Interest—Debt to Bankers—Authority to Trustees to pay Income.

Under a settlement, *O.* was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation, dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. *O.*, being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest and in reduction of the debt. It was alleged that there was an agreement with the bankers that the authority should be revocable:—

Held, that this occasioned a forfeiture of the life interest.

UNDER a settlement, on the marriage of Captain *Oldham*, made in 1843, the trustees stood possessed of an annuity of £600, upon trust to pay the same to Captain *Oldham*, "until he should either depart this life, or until he should have a fiat in bankruptcy duly issued against him, or take the benefit of the present or any future Act for the relief of insolvent debtors, or enter into a composition with his creditors for the payment of their debts, or mortgage, sell, assign, charge, or in any manner by way of anticipation, dispose of, the annuity or any part thereof, or until any other act or event whatsoever should happen, either by or through his own act or his own default, or by operation of law, whereby the said annuity, if continuing payable to him, should vest, or become liable to be vested, in any other person:" and after the decease of Captain *Oldham*, or the sooner determination by any such act or event as aforesaid of his interest therein, then in trust for his wife for her life, with remainder for the children of the marriage.

The question in the case was whether Captain *Oldham* had forfeited his life interest in the annuity under the following circumstances:—

Captain *Oldham*, who was in embarrassed circumstances, kept a banking account with Messrs. *Salt & Co.*, which was overdrawn to the amount of about £3000. This amount was secured by policies

of assurance, the premiums on which were paid by the trustees of the settlement, by the direction of Captain *Oldham*.

In 1857, after other negotiations, Mr. *Salt*, a member of the banking firm, wrote to Captain *Oldham*, and proposed that, on condition of his giving a further policy for £500, and understanding that Captain *Oldham's* future income would be £1000 per annum, *Salt* should receive the income and pay him £600 a year, leaving a sinking fund of £400, of which £300 should go towards payment of premiums and interest, and in liquidation of the debt to the bank, and £100 towards liquidation of his other debts. He added, "Please to sign and return this order, to empower the trustees to pay everything for you to the bank."

On receiving this letter, Captain *Oldham* and his wife acknowledged it, and sent the following authority to the trustees:—

"To the trustees and trustee for the time being of the settlement executed on the marriage of us, the undersigned, *Charles Oldham*, and *Helen*, his wife. We, the undersigned, *Charles Oldham*, and *Helen*, his wife, do hereby direct and authorize you to pay from time to time, as the same shall become due and be received by you, all interest, dividends, rents, and income, coming to your hands as such trustees or trustee to the credit of the undersigned *Charles Oldham*, with Messrs. *Salt*, bankers, whose receipt to you shall be a full discharge.

"Dated the 12th of September, 1857."

The following passages from the affidavit of *Salt* explain his view of the nature of the authority thus given:—

"I think there was an order to the trustees to pay the trust income into our bank, to Mr. *Oldham's* account. I think it probable that Mr. *Oldham* agreed with us that such an order should be given, but I do not remember. I had an agreement with Mr. *Oldham* that we should remit certain sums periodically to him out of the moneys standing to his account in our bank, and retain the remainder to reduce the debt. When the money was once paid to his account at our bank, we should have objected if he had drawn a cheque for the whole amount, but at any moment he could have prevented the trustees from paying the income to our bank. If this suit were not existing we could not prevent Mr. *Oldham* from not

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paying his income into our bank; but I should think it very odd if he did do so, because he is an honourable man. There was an agreement between me and Mr. *Oldham* that we should pay him £50 a month, and keep the remainder to reduce our debt. We should not have allowed him to draw cheques beyond the agreed allowance."

The question whether the forfeiture had accrued, came before the Court in two suits; one by Captain *Oldham*, to which the trustees were Defendants, the other by the wife and children appearing by a next friend, to which Captain *Oldham* and the trustees were Defendants. The object of both suits was to have the trusts of the settlement performed.

Mr. *Selwyn*, Q.C., and Mr. *Shebbeare*, for Captain *Oldham*, contended that the whole of the arrangement shewed that the property, after it came into the hands of Messrs. *Salt & Co.*, with whom Captain *Oldham* had a banking account, was so dealt with as to create no new interest in the bankers. The authority to the trustees to pay the dividends was revocable, and did not involve a forfeiture of the life interest under the settlement.

Mr. *Southgate*, Q.C., and Mr. *Skene*, for the wife and children:—

Where a document, which is in its nature revocable, such as a power of attorney, is given to repay a debt, then, if it affects a life interest, it is a dealing with the property by way of anticipation, and cannot in equity be revoked. Thus in *Wilkinson* v. *Wilkinson* (1), under a proviso against assigning or charging a life interest, a power of attorney authorizing the receipt of the rents and payment in discharge of debts was held sufficient to determine a life interest. The authority given by Captain *Oldham* to the trustees was a dealing with the income "by way of anticipation," which was one of the events on which forfeiture was to accrue. This authority could not have been revoked, and this Court would have restrained Captain *Oldham* if he had attempted to do so.

Mr. *Pearson*, Q.C., and Mr. *Goren*, for the trustees.

Mr. *Selwyn*, in reply:—

The argument on the other side is based on a mistaken view of

(1) 3 Sw. 515.

Mr. *Salt's* position. He was both a banker and a creditor. The authority to the trustees was simply an authority by Captain *Oldham* to pay the dividends into his banker's account, and the Court will not construe such an authority as an irrevocable agreement between the parties, or as a charge on the property.

Jan. 18. LORD ROMILLY, M.R.:—

The question in this case is whether Captain *Oldham* has incurred a forfeiture of his life estate under a clause in the settlement made upon his marriage.

[His Lordship then stated the facts of the case.]

I am of opinion that what took place amounts to a forfeiture of the life interest. It is not necessary to refer to many authorities, or to many principles, for the purpose of saying that, assuming that there is no species of trust, the authority, given for value, to trustees to pay over a life estate to another person would be an irrevocable security. In the case of *Wilkinson* v. *Wilkinson* (1), to which I was referred, there was the ordinary case of a power of attorney given for value, which, as everybody is aware, is not revocable. The only question is, whether the authority given constitutes an assignment in the present case? It is quite clear that by law it constitutes an assignment, but it is also quite clear that persons may by agreement, if they please, dispense with the law; "*modus et conventio vincunt legem*;" and, provided there is nothing *malum in se*, two persons may agree that the law shall not apply to a particular case. The evidence of Mr. *Salt* is very material on this subject.

[His Lordship then read the portion of Mr. *Salt's* affidavit before stated.]

In my opinion this is not sufficient to get rid of the charge upon the property. Mr. *Salt*, as he admits, well knew of the existence of the trust, and so did Captain *Oldham*, and therefore, in order to get over the difficulty, because if they made an assignment the fund was immediately gone, they agreed that this, which by law is irrevocable, should be revocable, but upon this condition, that

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Mr. *Salt* trusted to Captain *Oldham's* honour as a gentleman, he would never revoke it, and then it is supposed that this prevents the assignment. Now, of course, if this were so, any person might defeat a clause of this description by so acting. Take the case of *Wilkinson* v. *Wilkinson* (1). There was a power of attorney, given for value, to receive rents: that was considered to be irrevocable, and to create a forfeiture. Would there have been any difference if the person who gave the power of attorney and the person who received it had agreed that the power of attorney should be revocable as between them? It would only come to this, "We want to make a subterfuge by which in fact we can charge the amount, although by the settlement, if we attempt to do so, the fund itself is to go." By the evidence of Mr. *Salt*, it is clear that it is the continuance of this suit alone which has caused the suspension of the income, and that if this suit were discontinued he would expect that the income would be returned to his bank: it is only another mode of trying to keep the security on foot. I think this is not a case which is to be decided on the mere technical question, whether by reason of this agreement they have evaded the law, and not made that a charge which otherwise would have been one, but on the substance of the transaction. Supposing a regular mortgage or assignment were created of the property, and that the mortgagor and mortgagee, or assignor and assignee, agreed that this assignment should never be enforced, that no possession should ever be taken under it, and that there should be no foreclosure and no assignment to any other person,—would that have been in any way the less a charge upon the fund, when it was done for the mere purpose of preventing the forfeiture of the fund? The question is,—Is this a legal charge? is this a legal trust? If it be a legal trust, then the Court will not allow it to be evaded by that which is in substance an assignment, but as to which, in order to prevent the forfeiture from accruing, the parties enter into an agreement to prevent the legal consequences flowing from their acts. The mere legal consequence of the letters would be an assignment of the life interest.

The question is whether, in this state of things, it can be said that Captain *Oldham* has not entered into any composition with his

(1) 3 Sw. 515.

creditors for the payment of his debts when he has directed that his income of £600 a year should be paid to the bankers for interest and to create a sinking fund, and that he has not in any way by anticipation disposed of his estate therein, or done any act whereby the premises or his estate therein have become liable to be vested in any other person or persons whatsoever.

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It is quite clear that Mr. *Salt* might enforce this security at any time if he thought fit, and therefore the life interest is liable to become vested in another person.

I am of opinion, therefore, that the forfeiture has accrued, and I will make a declaration accordingly, and order that the trusts of the settlement shall be carried into execution.

Solicitors : Messrs. *Crawley, Arnold, & Green ;* Messrs. *Abbott, Jenkins, & Abbott.*

CRUMP *v.* LAMBERT.

M. R. 1867 *Jan.* 22, 25; *Feb.* 8.

Injunction Nuisance—Smoke—Noxious Vapour—Noise—Substantial Damage.

Smoke, unaccompanied with noise or with noxious vapour; noise alone; and offensive odours alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

The Court of Chancery will restrain the continuance of a nuisance by injunction, wherever substantial damages might be recovered in respect of it by an action at law.

An injunction granted to restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town : it being proved that such smoke, effluvia, and noise, were a material addition to previously existing nuisances.

THE Plaintiff, in 1864, became the purchaser of two semi-detached leasehold houses at *Walsall,* in *Staffordshire,* for an unexpired term of seventy-two years. The houses were situated at one side of a ridge known as *Mount Pleasant,* and commanded a view of the country in the neighbourhood of *Walsall,* the manufacturing part of the town being situated principally on the other side of the ridge, although there were factories of different kinds at no great

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distance. The Plaintiff had resided in one of the houses ever since he became the purchaser thereof.

In 1865, the Defendants, who were iron bedstead manufacturers, began to erect, and had since completed, a factory on a piece of land adjoining the Plaintiff's property. The factory contained two blast furnaces, one of which was in constant use for the purpose of smelting iron, in which process coke was burnt, and lime was used as a flux. A considerable quantity of coal was also consumed in driving a steam engine, and at smiths' forges within the factory; and the smoke and effluvia were carried away by a chimney fifty feet high, and about fifty-eight yards from the Plaintiff's house. A number of men and boys, stated by the Defendants not to exceed forty, were employed in hammering iron bars for the purposes of the manufacture.

The Plaintiff alleged that a large quantity of smoke constantly issued from the chimney of the factory, accompanied by offensive effluvia; that such smoke and effluvia, and the noise proceeding from the factory, were a nuisance which had diminished the value of his property, and also interfered with the comfort and health of himself and family; and in 1866 he filed his bill to restrain the Defendants from allowing smoke and effluvia to issue from the chimney of the factory, and from allowing noises to be made, so as to occasion nuisance and injury to the Plaintiff.

A motion had been made for an injunction, but, by arrangement, it stood over; and the cause now came on to be heard on motion for decree. A considerable mass of evidence, of a somewhat contradictory nature, was adduced upon the question of nuisance; but, as will be seen from the judgment, the Court was of opinion that the existence of the nuisance was clearly proved.

Mr. *Southgate*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiff:—

What constitutes a nuisance is defined in *Walter* v. *Selfe* (1), and it is quite clear that smoke, noxious effluvia, and noise, all fall within the definition. It may be said that all these things existed at *Walsall* before the Defendants erected their factory, and therefore that the factory has been erected at a fit and convenient spot. This doctrine was countenanced by *Hole* v. *Barlow* (2), but that

(1) 4 De G. & Sm. 315. (2) 4 C. B. (N. S.) 334.

case is no longer law: *Bamford* v. *Turnley* (1); *Cavey* v. *Ledbitter* (2); *Tipping* v. *St. Helen's Smelting Company* (3). And it has been expressly decided that ironworks may be a nuisance: *Elliotson* v. *Feetham* (4).

The evidence shews that the smoke and noise proceeding from the Defendants' works are a material addition to the pre-existing nuisance, and a substantial interference with the Plaintiff's rights.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Defendants, asked that an issue might be granted to try the question of nuisance. The Plaintiff complained of three things—smoke, noxious gas, and noise. There was no case of an injunction against smoke alone, or noxious gas alone, unless these were such as to injure vegetation, or otherwise substantially damage property. The only case of an injunction against noise was *Soltau* v. *De Held* (5); and there the noise was such as to shake the Plaintiff's house. The distinction between personal discomfort and material injury was insisted upon in *St. Helen's Smelting Company* v. *Tipping* (6). They contended that the Plaintiff's evidence was very much exaggerated, and that it was very doubtful whether he was entitled to an injunction.

Mr. *Southgate*, in reply:—

Noise has been held to be a nuisance: *Bradley* v. *Gill* (7); *Styan* v. *Hutchinson* (8); so has coal smoke: *Viner's* Abridgment, tit. "Nuisance" (9); and so have unwholesome smells: *Rex* v. *White* (10); *Rex* v. *Neil* (11). As to the question of material injury, if the doors and windows must be kept shut to exclude the smoke and noise, must not the house let for less?

Feb. 8. LORD ROMILLY, M.R.:—

The Plaintiff in this cause is the occupier and owner of a house

(1) 3 B. & S. 62.
(2) 13 C. B. (N. S.) 470.
(3) 4 B. & S. 608.
(4) 2 Bing. N. C. 134.
(5) 2 Sim. (N. S.) 133.
(6) 11 H. L. C. 642.
(7) Lutw. 69.
(8) 2 Selw. N. P. 1129.
(9) Vol. xvi. C. pl. 5, 6.
(10) 1 Burr. 337.
(11) 2 C. & P. 485.

M. R. 1867 CRUMP v. LAMBERT.

in *Walsall*, in *Staffordshire*, and complains that the Defendants have recently erected an iron factory adjoining his grounds, the smoke, noise, and effluvia proceeding from which occasion a nuisance which he applies to this Court to abate. The defence is, in substance, twofold; first, one of law, and, secondly, one of fact. The Defendants say that smoke alone does not entitle a person to come here for an injunction; that a disagreeable smell alone does not entitle a Plaintiff to ask for an injunction; that noise alone does not entitle a Plaintiff to ask for an injunction. Secondly, they insist that the evidence shews that there are no noxious gases emitted from the Defendants' works, and that the evidence on the part of the Plaintiff is grossly exaggerated, and that, having regard to the smoke and noise which always prevails in and about *Walsall*, the Defendants' factory has only made an inappreciable addition to what already existed.

With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapour, that noise alone, that offensive vapours alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighbouring property; that if they do so, substantial damages may be recovered at law, and that this Court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law. *Elliotson* v. *Feetham* (1), and *Soltau* v. *De Held* (2), are instances relating to noise alone. In the former, damages were recovered in an action at law; and in the second, an injunction was granted on account of sound alone.

What constitutes a nuisance is thus defined by Lord Justice *Knight Bruce*, when Vice-Chancellor, in *Walter* v. *Selfe* (3):—"Both on principle and authority the important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among

(1) 2 Bing. N. C. 134. (2) 2 Sim. (N.S.) 133. (3) 4 De G. & Sm. 322.

the English people?" This definition is adopted in *Soltau* v. *De Held* by Vice-Chancellor *Kindersley*, and is, I apprehend, strictly correct; and it agrees with the principle of all the cases referred to at common law and approved of in the case of *St. Helen's Smelting Company* v. *Tipping* (1), which settled the law as regards another part of this case, to which I shall presently have occasion, when citing *Hole* v. *Barlow* (2), to refer. The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case where a Plaintiff could obtain substantial damages at law, he is entitled to an injunction to restrain the nuisance in this Court. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapour, or water, or any other gas or fluid. The owner of one tenement cannot cause or permit to pass over, or flow into, his neighbour's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property. It is true that, by lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time has elapsed, the owner of the adjoining or neighbouring tenement, whether he has or has not previously occupied it,—in other words, whether he comes to the nuisance or the nuisance comes to him,—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water. And the doctrine suggested in *Hole* v. *Barlow*, that the spot from whence the nuisance proceeded was a fit, proper, and convenient spot for carrying on the business which produced the nuisance, is no excuse for the act, and cannot be made available as a defence either at law or in equity.

The real question in all the cases is the question of fact, viz. whether the annoyance is such as materially to interfere with the ordinary comfort of human existence. This is what is established

(1) 11 H. L. C. 642. (2) 4 C. B. (N. S.) 334.

M. R. 1867 CRUMP v. LAMBERT.

in *St. Helen's Smelting Company* v. *Tipping* (1), and that is the question which is to be tried in the present case.

The evidence shews, as indeed might have been expected from a house situated within the town of *Walsall*, although at the extremity of the town, that before the Defendants erected their present works a great deal of smoke and some noise occasionally affected the Plaintiff's property, and that more or less of smoke is constantly in the neighbourhood, arising from factories which have existed for more than twenty years, but after giving full consideration to all the evidence on this subject, I am of opinion that the smoke of the Defendants' factory has produced a completely new state of things as regards the Plaintiff's house and grounds, and that the smoke and noise materially interfere with the comfort of human existence in the Plaintiff's house and grounds. Indeed I think the evidence overpowering on this point, and that it is not really touched by the evidence adduced by the Defendants.

[His Lordship then referred to the evidence, and continued:—]

I am of opinion that the smoke and noise proceeding from the works of the Defendants constitute a substantial nuisance, and that the Plaintiff is entitled to the assistance of this Court to have it abated. I do not feel sufficient doubt about the case to induce me to grant an issue. I shall make such an order as the Vice-Chancellor made in *Walter* v. *Selfe* (2), that is, an injunction to restrain the Defendants, their servants, workmen, and agents from allowing smoke and effluvia to issue from their said factory so as to occasion nuisance, disturbance, and annoyance to the Plaintiff, as owner or occupier of the tenement in the bill mentioned; and a similar injunction to restrain the Defendants, their servants, workmen, and agents from making, or causing to be made, noises in the factory, so as to occasion nuisance, disturbance, and annoyance to the Plaintiff, as the owner or occupier of the said messuage in the bill mentioned. I cannot make the order more precise; it is always a question of degree; and if the Defendants can continue to carry on their works in such manner as to avoid any substantial issue of smoke or noise, they will not violate the injunction. Whether they do so or not may have to be tried in another proceeding. The

(1) 11 H. L. C. 642. (2) 4 De G. & Sm. 315.

costs must follow the event up to and including the hearing. Reserve liberty to apply.

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Solicitors for the Plaintiff: Messrs. *Monckton & Monckton.*

Solicitors for the Defendants: Mr. *W. H. Duignan,* agent for Messrs. *Duignan, Lewis, & Lewis, Walsall.*

EARL SPENCER *v.* PEEK.

M. R. 1867 *Feb.* 15.

Bill to perpetuate Testimony—Pending Suit against Plaintiff.

A bill to perpetuate testimony relating to a matter which is the subject of an existing suit against the Plaintiff is demurrable, although the Plaintiff could not himself have made such matter the subject of present judicial investigation.

THIS was a demurrer to a bill to perpetuate testimony.

The bill stated that the Plaintiff was lord of the manor of *Wimbledon;* that a small portion of the hereditaments comprised in the manor was copyhold; that the wastes of the manor consisted of "an ancient common, called *Wimbledon Common, Putney Heath, Roehampton Green,* and divers other pieces or parcels of waste, comprising 1000 acres or upwards;" that the lords of the manor had from time immemorial enjoyed and exercised the right, without the consent of any person or persons, of digging and taking away, and giving authority to dig and take away, any portions of the soil of the said common or other wastes, and of making bricks, pipes, or tiles, of the clay so dug, and selling the same; that the Plaintiff, as such lord, had caused portions of the soil to be dug and taken away, and had caused bricks to be made on the common from clay dug thereout, and to be sold for his own benefit, but had not, by the exercise of any of his rights, prejudiced the common rights (if any) of the tenants of the manor in respect of the common or other wastes; that on the 1st of December, 1866, a bill was filed against the Plaintiff by the Defendant, suing on behalf of himself and all other the freehold and copyhold tenants of the manor, alleging that he was a tenant of the manor, and that until recently the soil of the common was only dug under the superin-

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tendence of officers appointed by the tenants at General Courts Baron, and praying for an injunction to restrain the Plaintiff from using the soil of the common for making bricks, and for an account of the profits made by him from the sale of the soil and bricks; that the said suit of *Peek* v. *Earl Spencer* was still pending, and that the Plaintiff had entered an appearance therein, and was preparing his answer, but that considerable time must elapse before issue could be joined, and that a material portion of the Plaintiff's evidence in support of his defence in that suit, consisting of the testimony of four aged persons named in the bill, who had lived all their lives in the neighbourhood, and were the only persons now living capable of giving testimony as to some of the matters in litigation in *Peek* v. *Earl Spencer*, was in danger of being lost; and it charged that the Plaintiff was entitled to have such testimony perpetuated, not merely with a view to supporting, in *Peek* v. *Earl Spencer*, his title in respect of the matters in litigation in that suit, but also for supporting the title of the Plaintiff and his successors in respect of the same matters, if they should thereafter become the subject of litigation or judicial investigation between any of the tenants of the manor for the time being and the Plaintiff or any of his successors in title; and it prayed that the Plaintiff might be at liberty to examine the said four persons in respect of the matters and for the purposes aforesaid, and that their testimony might be perpetuated in order that the same might be used "as well in connection with the said suit of *Peek* v. *Earl Spencer*, as at all other proper times as occasion shall require."

No affidavit had been filed with the bill.

The Defendant demurred on three grounds, viz.:—1st. Want of equity; 2nd. Uncertainty in the description of the wastes of the manor; 3rd. The omission to file an affidavit.

Mr. *Baggallay*, Q.C., and Mr. *E. R. Turner*, for the demurrer:—

First: A bill to perpetuate testimony is demurrable, unless it is expressly alleged, or appears from the statements in the bill, that the matter, to which the testimony is alleged to relate, cannot be made the subject of present judicial investigation: *Mitford* on Pleading (1); *Story*, Eq. Pl. (2); *Angell* v. *Angell* (3); *Ellice* v.

(1) Pp. 52, 150. (2) S. 303. (3) 1 S. & S. 83.

Roupell (1). Again, a bill to examine witnesses, *de bene esse*, can only be filed in aid of proceedings at law, and since Courts of law have had power to take such evidence bills of the latter class have become obsolete. But this bill alleges that the matter to which the testimony it seeks to perpetuate relates, is actually in litigation in this Court. The Plaintiff may obtain an order to examine these witnesses *de bene esse*, in the suit of *Peek* v. *Earl Spencer*, before putting in his answer: *Bown* v. *Child* (2); and the evidence so taken would be just as available to him in any future litigation as if it had been taken in this suit. Moreover, the Plaintiff could at once institute a suit in the nature of a bill of peace against the tenants of the manor to establish his alleged right: *Maddock's* Chancery Practice (3); *Weeks* v. *Staker* (4); *Arthington* v. *Fawkes* (5); *Conyers* v. *Lord Abergavenny* (6); *Lord Tenham* v. *Herbert* (7).

[THE MASTER OF THE ROLLS.—There are many cases of such bills after actions have been brought against the lord; but could he file a bill *quia timet* until his right had been disputed?]

It is submitted that he could. This bill, however, alleges that the right has been disputed, and is the subject of a pending suit. It therefore appears upon the face of the bill that this suit is useless and unnecessary.

Secondly: The statement in the bill that the wastes of the manor consist of an ancient common called *Wimbledon Common*, *Putney Heath*, *Roehampton Green*, and "divers other pieces or parcels of waste, comprising 1000 acres or upwards," is not a sufficiently distinct statement of the right claimed by the Plaintiff, in respect of which he seeks to perpetuate testimony; it would be impossible for the Defendants to cross-examine the witnesses without knowing what are the "divers pieces or parcels of waste" to which the bill refers. On this ground, therefore, also, the bill is demurrable: *Gell* v. *Hayward* (8); *Cresset* v. *Mitton* (9).

Thirdly: If this is to be treated as a bill to examine wit-

(1) 32 Beav. 299. 9 Jur NS 530
(2) 3 Sim. 457.
(3) Page 168, 2nd ed.
(4) 2 Vern. 301.
(5) 2 Vern. 356.
(6) 1 Atk. 285.
(7) 2 Atk. 483.
(8) 1 Vern. 312.
(9) 1 Ves. 449; 3 Bro. C. C. 481.

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nesses *de bene esse*, it is demurrable on the ground that no affidavit was filed with it: *Mitford* on Pleading (1); *Philips* v. *Carew* (2).

[THE MASTER OF THE ROLLS desired the Plaintiff's counsel to confine their arguments to the first ground of demurrer.]

Mr. *Jessel*, Q.C., and Mr. *Holmes*, for the bill:—

This is a bill for two objects, viz.:—1st. To perpetuate testimony with a view to possible future litigation; and 2nd. To examine witnesses *de bene esse*, with a view to the pending suit of *Peek* v. *Earl Spencer*. Assuming that it is demurrable as to the second, still, if it is good as to the first, a general demurrer must be overruled. If the allegations as to the suit of *Peek* v. *Earl Spencer* were struck out of the bill, a sufficient case would be stated to support a bill to perpetuate testimony; but those allegations are inserted only to shew that the Defendant is a person who disputes the Plaintiff's alleged rights.

[THE MASTER OF THE ROLLS referred to *Frietas* v. *Dos Santos* (3).]

There the real object of the bill was to restrain an action as to a particular sum of money, and a general allegation of mutual accounts was held insufficient to support the bill. Here the bill shews a clear case for perpetuating testimony without reference to the suit of *Peek* v. *Earl Spencer*. It is no objection to a bill to perpetuate testimony that the Defendant, or any other person except the Plaintiff, can make the matter to which the testimony relates the subject of immediate judicial investigation. Unless the Plaintiff is, or can make himself, *dominus litis* in a present suit, he has no means of preserving evidence. The present Defendant may at any time dismiss his bill in *Peek* v. *Earl Spencer*, or he may die or become bankrupt, and the suit may not be revived, and in any of these cases the Plaintiff will lose the benefit of this evidence. That the rule, as stated by Lord *Redesdale* (4), is confined to the case of the Plaintiff himself, having

(1) Page 150.
(2) 1 P. Wms. 117.
(3) 1 Y. & J. 574.
(4) Mit. Pl. p. 52.

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no present right of action or suit, is explained by Mr. *Jeremy's* note, and is clearly pointed out in *Story's* Eq. Pl. (1), where he adds to Lord *Redesdale's* statement these words, "Or if they can be so investigated, the sole right of action belongs exclusively to the other party." In *Angell* v. *Angell* (2), Sir *John Leach* says, "If the party who files the bill can by no means bring the matter in question into present judicial investigation . . . . then Courts of equity will entertain such a suit, for otherwise the only testimony which could support the Plaintiff's title might be lost by the death of the witnesses. Where he himself is in possession, the adverse party might purposely delay his claim with a view to that event." So here, if the Plaintiff applied to examine these witnesses in the other suit, the present Defendant might immediately dismiss his bill in that suit, and file a new bill when they are dead. It may be said that if the Defendant were to dismiss his bill, the Plaintiff might file a bill to perpetuate testimony, but in the meantime the witnesses may die, and, therefore, the Plaintiff is entitled to have their evidence taken now in a suit which cannot be stopped without his consent. Unless, then, the Plaintiff can at once file a bill to establish his right, this bill, so far as it seeks to perpetuate testimony with a view to future litigation, is not demurrable. But a lord of a manor cannot file such a bill unless his right has been attacked either by actions at law or by some act entitling him to an injunction. In *Weeks* v. *Staker* (3) and *Arthington* v. *Fawkes* (4) injunctions were granted to restrain cutting timber or pulling down fences. In *Phillips* v. *Hudson* (5), all the authorities were searched, and no case could be found of a bill of peace by a lord of a manor in undisturbed possession.

But this bill may be supported, so far as it seeks to examine witnesses in support of the Plaintiff's defence in *Peek* v. *Earl Spencer*. It does not follow that because a Defendant may obtain an order to examine them in that suit he may not file a bill for the same purpose, just as a Defendant may file a cross bill for the purpose of discovery, although he might obtain the discovery by interrogating the Plaintiff.

(1) Page 303. (2) 1 S. & S. 83, 89. (3) 2 Vern. 301.
(4) 2 Vern. 356. (5) Law Rep. 2 Ch. 243.

M. R. LORD ROMILLY, M.R.:—

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I am of opinion that this demurrer must be allowed. The principle which is laid down in all the cases is, that if the matter to which the required testimony is alleged to relate can be immediately investigated in a Court of law, and the witnesses are resident in *England*, a demurrer will hold. This is laid down by Lord *Redesdale* in many of the passages where he mentions those cases. It is contended that this can only apply where the Plaintiff in a bill for the perpetuation of testimony can himself bring an action and have the matter tried; but I apprehend that to be a mistake, and that if the matter is in the course of investigation in a suit, that removes the exact objection. It is stated by Mr. Justice *Story*, laying down the same rule, that where a right of action lies in the Defendant, although the matter might be investigated in a Court of justice, still the bill would lie; and I assent to that view of the case. What Mr. Justice *Story* means is, that where the right is in the other party to bring an action against the Plaintiff who files the bill to perpetuate testimony, he may maintain such a bill if no such action is brought. It is quite new to me, and I believe nobody will find such a case in the books, that where a person brings an action or files a bill against a Defendant in respect of a matter to be tried, which the Defendant might not have been able himself to have put in a course of litigation to get determined, that Defendant can file a bill to perpetuate testimony as to the matters in litigation in that suit. I do not believe that any such bill can be found, and it would, in my opinion, be contrary to principle and precedent. It is obvious that if a person files a bill in this Court against a person who is the owner of an estate, alleging that he is, by reason of certain circumstances, a trustee for the Plaintiff, and asking that he shall be compelled to account and deliver it up, a bill by the Defendant for the perpetuation of testimony would not lie. The passage in Sir *John Leach's* judgment in *Angell* v. *Angell* (1) has been, in my opinion, misunderstood; he expressly points out that it is where an investigation is not about to take place in a Court of justice that such a bill would lie. He says "if it be possible that the matter in question can, by the party who files

(1) 1 S. & S. 89.

the bill, be made the subject of immediate judicial investigation, no such suit is entertained; but if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in possession) there Courts of equity will entertain such a suit, for otherwise the only testimony which could support the Plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event." But if instead of delaying his claim with a view to that event, he brings forward his claim immediately, then, as the question will be made the subject of immediate judicial investigation, and as a suit is instituted for that purpose, a bill to perpetuate testimony cannot be brought in aid of the defence to that suit: it can only be brought where the question is not about to be made the subject of judicial investigation. Mr. *Jessel* felt that this was the pinch of the case, and accordingly his argument rested upon this, that the Plaintiff in the other suit may dismiss his bill at any moment. Unquestionably he may, and if there is no bill pending, then the lord of the manor may file a bill for the perpetuation of testimony for the purpose of establishing his rights in the manor; but if the matter is about to be investigated in a pending suit, so long as that suit is in existence, his proper course is to apply in that suit for an order to examine witnesses *de bene esse*, and not to file a bill for the perpetuation of testimony. It would be a great oppression on the Plaintiff in the first suit, if he were to be made a Defendant in a suit for the perpetuation of testimony, as he would have to go through the expense of the whole of such a suit, the greater part of which might not be necessary. A case for the perpetuation of testimony is not confined to old and infirm witnesses, or to a single witness who alone can speak to the matter. In a case where you examine witnesses *de bene esse* it is so confined. In a case for the perpetuation of testimony you may examine everybody, and all the evidence is sealed up, and only brought out when occasion requires it, and if the witnesses are alive it cannot be used, and the evidence must be taken over again. If I were to allow this suit to continue, Earl *Spencer* might examine all the inhabitants of the town of *Wimbledon* and the neighbourhood, whatever their ages,

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and the Plaintiff in the suit of *Peek* v. *Lord Spencer* would be compelled to cross-examine them, and that evidence would be sealed up, and not one of the depositions could be used in case they should be alive at the time the evidence is taken in the first suit. That is not the object of a bill to perpetuate testimony; such a bill is not to be used as a defence to an existing suit.

This is a case in which the Plaintiff might have obtained an order for the examination *de bene esse* of these old witnesses. As a bill for that purpose, I do not think that this bill can properly be sustained. The order ought to have been obtained by a proceeding in the other suit itself. I am, therefore, of opinion that this demurrer ought to be allowed with costs.

Solicitors for the Plaintiff: Messrs. *Frere, Cholmeley, & Forster.*
Solicitor for the Defendant: Mr. *P. H. Lawrence.*

M. R. 1867 *Feb.* 7.

FINANCIAL CORPORATION *v.* BRISTOL AND NORTH SOMERSET RAILWAY COMPANY.

Time to answer—Evasive Answer—Taking Answer off the File.

A Defendant, having several times obtained an extension of time to answer, filed at last a document stating that he was unable to answer the bill in the absence of information, for which he had sent to the continent, and which he had been unable to obtain. On motion by the Plaintiff, the document was ordered to be taken off the file, and the Defendant ordered to pay the costs of the motion, and all other costs occasioned to the Plaintiff by filing such answer.

IN this case the bill was filed against the above-named company and *John Bingham*, the secretary, as Defendants, on the 10th of August, 1866, and interrogatories were served on the Defendants on the 24th of August. On the 20th of September the Defendants obtained an order for six weeks' further time to answer, and they obtained several subsequent orders extending the time.

On the 17th of January, the Defendant *Bingham* filed the following answer:—

"I am unable to answer the Plaintiff's bill in the absence of

information, for which I have sent to the Continent and other places, and which, in consequence of parties, who formerly composed the board of directors of the Defendant company, having retired from such board, I am unable to ascertain.

"I have no personal interest in the matters in question in this cause."

This was a motion to take the answer off the file.

Mr. *Baggallay*, Q.C., and Mr. *Renshaw*, in support of the motion, referred to *Read* v. *Barton* (1).

Mr. *H. C. Hull*, for the Defendant *Bingham*, submitted, with regard to the answer (which had been prepared and signed by another counsel not in the case), that it was for the Plaintiff to take exceptions. The case of *Read* v. *Barton* was distinguishable.

LORD ROMILLY, M.R.:—When a Defendant obtains an extension of time for answering, it is on the understanding that a *bonâ fide* answer will be put in. In the present case this has not been done, for the Defendant merely says that he is unable to answer the Plaintiff's bill. The answer must be taken off the file, and the Defendant must pay the costs of the motion, and any costs properly incurred by the Plaintiff in consequence of such an answer having been filed, following the order in *Read* v. *Barton*.

Solicitors for the Plaintiff: Messrs. *Flux & Argles*.
Solicitors for the Defendant: Messrs. *Edwards, Webb, & Co.*

(1) 3 K. & J. 166.

V.-C. K.
1866
Nov. 15.

ATTORNEY-GENERAL *v.* MARCHANT.

Information—Charitable Bequests—Application of Accretions.

A testator, in the year 1640, left real estate upon trust to pay £50 per annum to four charitable objects, namely, £20 for the salary of a schoolmaster, £20 to a college for the purchase of books, and two sums of £5 to the poor of two parishes, with a direction that any deficiency should be borne rateably. The funds of the charity having increased in the lapse of time, an information was filed for a scheme for the application of the accretions:—

Held, that the rule was to apportion the accretions to charitable funds between the different objects of the charity *pro rata*, subject to the discretion of the Court in special cases. That the salary of a schoolmaster and the purchase of books were both objects equally deserving to be increased; but the gifts for the benefit of the poor being objectionable on principle, the Court would exercise its discretion in refusing to augment those bequests.

THIS was an information filed by the Attorney-General, *ex officio*, at the instigation of the Charity Commissioners, against the trustees of the charity.

The information stated that the Rev. *Richard Rands*, by his will, dated the 30th of June, 1640, after giving a life estate to his wife, gave and bequeathed all his lands and tenements in the parish of *Hartfield*, in the county of *Sussex*, unto four trustees and their heirs and assigns, for ever, upon trust and confidence that they, their heirs and assigns, should, after the decease of the testator's wife, with the advice and approbation of the minister and churchwardens of *Hartfield* for the time being, or in default of the said minister of *Hartfield*, then with the advice and approbation of two of the next ministers to *Hartfield*, provide one able, learned, discreet, and sufficient schoolmaster, being a graduate in one of the universities of *Oxford* or *Cambridge*, to teach all such children of the parish of *Hartfield* as should repair unto the said schoolmaster freely, without requiring anything for the same, of the said children or any that should have the custody or governance of them, so as all and every such children should be able to read English before they should come to the said schoolmaster to be taught; and that as often as the said schoolmaster's room should happen to be void by

death, removal, or otherwise, from the said place, upon just occasion by the said testator's devisees, their heirs or assigns, that then the trustees should nominate one other discreet, able, and learned man to supply the room of the said schoolmaster then being void; and that the trustees, their heirs or assigns, from time to time for ever, should pay to the said schoolmaster for the time being, for his pains therein to be taken, yearly and every year, £20 at the four usual quarter days, out of the rents, issues, and profits of the said messuages, lands, and premises; and also upon further trust, that the said trustees should, out of the said rents, issues, and profits, pay to the president and two of the senior fellows of *Trinity College*, in *Oxford*, where the testator received his education, £20 yearly and every year for ever. And the testator willed that if the president and two senior fellows of the said college for the time being, should not yearly disburse and lay out the said sum of £20, or at least £16 thereof, upon such books as they should think meet, and also if the other £4, remainder of the said yearly payment, should not be for ever employed upon the repairing and adorning of the library, that then the said yearly payment should be void; and the testator willed that in such case the said yearly payment of £20 should be paid to the rector and two senior fellows of *Lincoln College, Oxford*, for the time being, to be laid out in the purchase of books as the same ought to have been laid out by the president and fellows of *Trinity College*. And also upon further trust, that the trustees should, out of the said rents, issues, and profits, yearly pay to the churchwardens and overseers of the poor for the time being of *Hartfield*, £5 upon Trinity Sunday and Good Friday, by equal portions to be distributed to the poor people of *Hartfield* aforesaid; and also upon further trust, that the trustees should out of the said rents, issues, and profits, yearly pay unto the churchwardens and overseers of the poor for the time being of *Fishlake*, in the county of *York*, or some of them, or their lawful deputy or deputies, £5, to be by the said churchwardens and overseers yearly for ever distributed to the poor people of *Fishlake*. The will then contained a clause for the appointment of new trustees. And lastly, the testator willed that if any suit or suits in law should happen to arise touching the tenure or title of any of the messuages, lands, or tenements, or concerning anything in the testator's will contained,

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as to the disposition of his lands and tenements; or if all his lands and tenements should not continue to be of so much clear yearly value as all the said yearly payments should amount to, then the testator willed that all such sums of money as should be expended in clearing or maintaining the said tenure or title of the said messuages, lands, and premises, or in maintaining and making good any gift out of the same, or so much as the true yearly value of the said messuages, lands, and premises, should be less than all the said several yearly payments, should be from time to time proportionately borne and rateably deducted out of the several yearly payments in the testator's will given.

Since the death of the testator numerous appointments of trustees had taken place; and lastly, by an indenture dated the 31st of January, 1861, the Defendants *Charles Marchant*, *Charles Abbott*, *John Payne*, and *Thomas Killick*, were appointed trustees of the charity, and had ever since acted as such.

The entire property devised by the will consisted altogether of eighty-seven acres, and was let at an annual gross rent of £82.

The several specific payments directed by the will amounted to £50 per annum, and the trustees had invested the surplus from time to time in the savings bank.

The several matters set forth in this information had been certified by the Charity Commissioners, and these proceedings were taken at their instigation.

The information prayed that it might be declared that the whole of the rents and profits of the estates, lands, and premises devised by the testator *Richard Rands* ought to be applied to the several charitable objects mentioned in the will; that a scheme might be settled for the future administration of the charity and the application of the rents and profits of the said lands, hereditaments, and premises; and that all necessary accounts of the rents and profits of the charity estates might be taken.

The question now raised for the decision of the Court was, whether the surplus revenue of the charity estates, after answering the specific purposes set forth in the will of the testator, should be divided rateably between the charities named in the will, or whether it should be appropriated for the benefit of one or more of the objects, to the exclusion of the others.

Mr. *Vaughan Hawkins*, for the Attorney-General:—

The primary object of the testator's bounty was the establishment of a school in the parish of which he was the incumbent. It was evidently his desire to found a school in the nature of a grammar-school since he directed that the master should be a graduate in one of the universities. Of course it would be impossible in these times to obtain the services of such a master for the small sum of £20 a-year, but any increase of that salary would make it easier to provide a good and efficient master, and thus the testator's wishes would be more nearly attained.

The Attorney-General, upon these considerations, has thought that it would be better to apply the whole of the surplus rents in augmenting the salary of the schoolmaster than in apportioning such surplus rateably among all the objects of the charity.

The following cases point out the principle upon which the Court acts in appropriating the surplus funds of a charity: *Attorney-General* v. *Arnold* (1); *Thetford School Case* (2); *Attorney-General* v. *Caius College* (3).

The testator, in giving the rents and profits of an estate to the amount of £50, must have supposed that there would be more than that exact sum, and the Court must assume that there would have been at least a few shillings beyond the exact amount given. It is, therefore, the duty of the Court to deal with that surplus, whatever it may amount to, in its absolute discretion.

Mr. *Hardy*, for the schoolmaster:—

When there is a surplus in the revenue of a charity, and no provision is made by the testator for the application of that surplus, it is for the Court to decide how it shall go, and, in doing so, to apply the doctrine of *cy pres*. The Court has power to alter the distribution of charity funds, if it thinks fit. This was done in *Attorney-General* v. *Mayor of Bristol* (4), where there was a provision for a certain number of old men, and the Court directed the surplus to be applied for the maintenance of a certain number of women as well as men.

In many cases the Court has taken into account the require-

(1) Show. P.C. 22.
(2) 4 Coke, 401.
(3) 2 Keen, 150.
(4) 2 Jac. & W. 294.

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ments of the different charities for the purpose of making a proportionate distribution: *Attorney-General* v. *Johnson* (1); *Ex parte Jortin* (2); *Philpott* v. *St. George's Hospital* (3); and in *Attorney-General* v. *Dean and Canons of Windsor* (4), although it is stated that, as a rule, the increase of a charity would be divided rateably between the different charities named, still that is subject in special cases to the discretion of the Court.

In the present case the application of the surplus funds in raising the salary of the schoolmaster will be more likely to effectuate the testator's intention than in augmenting the amount applicable for the purchase of books for a library at *Oxford*. No one can suppose that *Trinity College* is in want of such funds, and the £20 received will go much further in the purchase of books now than it would have done when the testator left the money; whereas the £20 by way of salary to a schoolmaster will not at the present day procure such a master as the testator contemplated, although it might have been sufficient 200 years ago.

The two remaining objects of the testator's bounty being merely charitable, without any service to be done as a return, would be less favourably regarded as objects requiring increase.

Mr. *Charles Hall*, for *Trinity College*:—

It is not disputed that the Court may, in special cases, apply the surplus funds of a charity according to its discretion, but there are no special circumstances requiring that this case should be taken out of the general rule that the surplus fund should be apportioned rateably. The doctrine of *cy pres* has nothing to do with a case like this. The rule on which the Court acts is laid down in *Mercers' Company* v. *Attorney-General* (5); *Attorney-General* v. *Coopers' Company* (6); and *Mayor of Beverley* v. *Attorney-General* (7). The gift for the purchase of books is as much to benefit education as the payment of a schoolmaster's salary; and if the whole surplus were applied in increasing the salary, a graduate of one of the universities would not be obtained. They have now got a duly qualified and certificated schoolmaster,

(1) 1 Amb. 190.
(2) 7 Ves. 340.
(3) 27 Beav. 107. 5 Jur. N.S. 684
(4) 8 H. L. C. 369. 6 Jur. N.S. 1083.
(5) 2 Bli. N.S. 184.
(6) 19 Ves. 187.
(7) 6 H. L. C. 310. 3 Jur. N.S. 871.

and it is not likely that they would turn off the present master if the salary should be increased. The object of the testator would, therefore, be no nearer attainment than it is at the present time. The testator having directed that in case of a deficiency in the funds it should be borne rateably by all the objects of the charity: so ought they all to participate in any accretions.

Mr. *Vaughan Hawkins*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

The fund with which the Court has now to deal is not a surplus of annual income, existing at the time of the gift, beyond what was necessary to satisfy the particular sums given to the particular objects pointed out, but a fund which arises from an increase of rents and profits consequent on the general increase in the rents of land. It was ingeniously argued that, inasmuch as the testator gives certain annual sums of money amounting to £50 for specific objects, it ought to be presumed that there must have been at the time of the gift some surplus, however small, perhaps only amounting to a few shillings. I do not know why I am to presume either way. The testator has, indeed, directed that if the property should not continue of sufficient annual value to provide the £50, all the charitable objects should bear the deficiency *pro rata*. The inference I should draw from this is, that at that particular time the testator considered the property sufficient, but not more than sufficient, to pay the £50 a-year, and that it might possibly become insufficient. Even if I were to assume that at the time of the gift there must have been a trifle of rent over the £50, that which the Court is now dealing with does not arise from those few shillings, but is an increase of the rents and profits of the land generally, arising from the general increase of the rents and profits of land throughout the country which has taken place in the lapse of more than two centuries. Assuming that to be so, what is the rule of law in such a case as this? I apprehend that the rule of law is that which is laid down by Lord *Kingsdown* in the case of *Attorney-General* v. *Dean and Canons of Windsor* (1), that the accretion is *primâ facie* to be applied and apportioned *pro rata* among the

(1) 8 H. L. C. 452.

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objects of the testator's bounty, but subject to the discretion of the Court to be exercised in certain cases, and within certain limits. It appears to me that is the rule which ought to be applied here. It is impossible to specify to what extent, or under what circumstances, the Court will exercise its discretion of varying the proportions. But suppose, for example, that one of the objects should have so far ceased as that there are few or no objects of that particular kind, and, therefore, should not require any increase: that, I think, would be a case for the exercise of the Court's discretion. So, I apprehend, if it should appear that the directions of the testator with respect to a particular object, if carried out in these days, so far from being beneficial, would be detrimental to the objects he meant to benefit: in that case a good reason would exist for exercising the discretion. Other examples might be given affording a sufficient reason for exercising the discretion. Applying, then, this rule to the present case, what are the specific objects of the testator's bounty?

The first object is the establishment of a school at *Hartfield*, of which parish the testator was the incumbent. His object was to benefit the poorer classes by giving them the means of education. He intended it, indeed, to be something in the nature of a grammar school, where all classes should be gratuitously educated: and the master was to be a graduate at one of the universities, and he was to be paid a salary of £20 a-year. Perhaps in those days that amount would have been sufficient to procure the services of such a master. But at the present day it is altogether inadequate for the purpose; and therefore, there being a school at *Hartfield*, and, as far as I can judge, a very useful school, though not exactly what the testator desired, the £20 per annum which he allotted for a school has been given to that school, and, together with money arising from other sources of income, has been sufficient to support it. There seems to me no reason why that school should not receive the benefit of some portion of the increased rent of the charity estate; though not, as contended on the part of the schoolmaster, the whole of it, in entire disregard of all the other objects of the testator's bounty.

The next object of the charity is to provide £20 for the purchase of books for *Trinity College, Oxford*. That gift, though in a dif-

ferent form and shape, is as much an educational object as the school; and without staying to inquire whether it is as much wanted as the school, I need not say that the existence of a large and well-assorted library tends to the promotion of education; and as the testator has thought fit to select, as one of his objects of charity, that particular mode of promoting education, and to appropriate to it an amount equal to that which he gives to the school, I think the library must partake of the benefit of the increased rent, and that the rule of apportionment *pro rata* ought to be applied, at least as between those two objects.

Then I come to the third and fourth objects—£5 for the poor of *Hartfield*, and £5 for the poor of *Fishlake*. I think, by common consent, it is established at the present day that there is nothing more detrimental to a parish, and especially to the poor inhabitants of it, than having stated sums periodically payable to the poor of that parish by way of charity. The poorest class of all is not allowed to participate in such charities, because the Court, in such cases, always excludes those who are in the receipt of parochial relief, inasmuch as that would be a relief to the poor rates, and so a charity to the ratepayers and not to the poor. The only effect of such gifts is to pauperize the parish; that is, to bring into the parish a numerous class of poor persons just above the class of those who are in receipt of pauper relief, but always tending to fall into and increase the last-mentioned class. I think it would be detrimental to the poor of these parishes to increase what has already been dedicated to them by the testator. And I am of opinion that this is one of those cases in which, though the *primâ facie* rule is apportionment *pro rata*, the Court should exercise its discretion, and say that these are objects to which no portion of the increase ought to be given. I shall therefore direct that the accretions shall be applied, as to one moiety, for the benefit of the school, and as to the other moiety for the benefit of the library of *Trinity College*. The case will go back to Chambers with a declaration of this opinion by the Court.

Solicitor for the Information: Mr. *Fearon*.
Solicitors for the Schoolmaster: Messrs. *Smith, Stenning, & Croft*.
Solicitor for *Trinity College*: Mr. *Philpot*.

V.-C. K.
1866
Nov. 12.

In re MARNER'S TRUSTS.

Practice—Costs—Petition—Tenant for Life—Trustee Relief Act.

Where a trust fund has been paid into Court under the *Trustee Relief Act*, the costs of a Petition by the tenant for life for payment to him of the dividends will be payable out of the income.

THIS was a Petition by the tenant for life of a fund, which had been paid into Court under the *Trustee Relief Act*, asking that the dividends thereon might be ordered to be paid to her during her life. The Petition prayed that the costs of the Petition might be raised out of the *corpus* of the fund; and when it came on to be heard early in the year, the Vice-Chancellor desired that it should stand over until a general order had been made by the Lord Chancellor on the subject of the costs of such Petitions, it being expected that such an order would soon be issued.

Mr. *Berkeley*, for the Petitioner.

Mr. *H. F. Bristowe*, and Mr. *Langworthy*, for the Respondents.

SIR R. T. KINDERSLEY, V.C.:—

When this Petition came on before, being under the impression that the then Lord Chancellor (Lord *Cranworth*) would make a General Order, laying down some rule as to the costs of such Petitions as the present, I desired that the Petition should stand over until such an order had been issued. No such General Order was issued, but at a meeting of some of the Equity Judges at the house of Lord Chancellor *Cranworth*, a discussion took place on the subject, when it appeared that there was a difference of opinion as to whether such costs should be paid out of *corpus* or out of income; but the conclusion arrived at was, that the rule should be that the costs should be paid out of income. One of the Judges present suggested, as a reason why the costs should be paid out of income, that if they were to be paid out of the *corpus* it would be necessary that every such Petition should be served on all the

persons interested in the *corpus*, a course which would cause great expense and inconvenience. That reason the Lord Chancellor considered decisive, and concurred in the conclusion that the costs must be paid out of income, although he had expressed a different opinion in *In re Turnley* (1).

V.-C. K. 1866 *In re* MARNER'S TRUSTS.

In future, therefore, the costs of a Petition by tenants for life for payment of dividends will be paid out of income.

Solicitor for the Petitioner: Mr. *Webber*.
Solicitors for the Respondents: Messrs. *Wheatley, Ford, & Lloyd*.

BRYAN *v.* TWIGG.

V.-C. K. 1866 *Nov.* 3.

Construction—Annuity for joint Lives or Life of Survivor or longer Liver—Tenancy—Annuity.

Bequest of an annuity to be equally divided to and between *A.* and *B.* for and during their joint natural lives, or the life of the survivor or longer liver of them respectively:—

Held, that *A.* and *B.* took as tenants in common, and that there was no survivorship between them; and, therefore, the share of one dying went to his representative.

Affd by L.J. Rolt. 8 Ch. 103.

JONATHAN BURNHAM, by will, dated in 1797, among other annuities, gave and bequeathed an annuity or sum of £100 of lawful money of *Great Britain*, to commence and be computed from the death of *Samuel Bryan*, to be equally divided to and between *Jonathan Bryan* and *Jane Bryan*, two of the children of the said *Samuel Bryan*, for and during their joint natural lives, or the life natural of the survivor or longer liver of them respectively, "all which said last mentioned six annuities or annual payments I direct shall be paid to the several and respective annuitants respectively, or their several and respective assigns, whether such annuitants be of full age or otherwise at the time, as my executors, administrators, or assigns, shall direct or appoint."

Jonathan Burnham having died in 1861, the question arose whether the two annuitants took the annuity as joint tenants, or as tenants

(1) Law Rep. 1 Ch. 152; *12 Jur. N.S. 305.*

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in common, or, in other words, whether the whole annuity was payable to the survivor, or whether one moiety was payable to her and the other moiety went to the representative of the deceased annuitant.

Mr. *Baily*, Q.C., and Mr. *Boys*, for the Petitioner, the representative of *Jonathan Bryan*, relying on the case of *Jones* v. *Randall* (1), contended that the two annuitants took the annuity as tenants in common, and therefore that on the death of one of them his representative was entitled to a moiety until the death of the survivor.

Mr. *Shapter*, Q.C., for *Jane Bryan*, the surviving annuitant:—

The surviving annuitant is entitled to the whole of the annuity which is given to the two, or the survivor or longer liver of them, and *Jane Bryan* is the longer liver of them; and the words "equally to be divided" are not words of limitation, and do not control the gift, but only modify and regulate it: *Rigden* v. *Vallier* (2).

In the case of *Cranswick* v. *Pearson* (3), *Jones* v. *Randall* was commented on, as having been decided without the attention of the Court being called to the case of *Armstrong* v. *Eldridge* (4), and the Master of the Rolls held that the survivors were entitled to the whole.

It cannot be supposed that the intention of the testator was to provide for the representative of the deceased annuitant.

Mr. *Baily*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

It is not very easy to reconcile the cases which have been cited with each other, and it appears to me that none of them is exactly in point; but the case most similar to the present is *Jones* v. *Randall*.

The question is, whether the two persons to whom the annuity is given take it as tenants in common or as joint tenants—whether one of them being dead the survivor takes the whole during his

(1) 1 Jac. & W. 100.
(2) 2 Ves. Sen. 252.
(3) 31 Beav. 624.
(4) 3 Bro. C. C. 215.

life, or whether the representatives of the deceased are entitled to a moiety of the annuity.

It appears to me that the prior part of the gift is in terms such as to create a tenancy in common between the two annuitants, and that the latter part merely expresses the period for which the annuity is to be enjoyed. It has been suggested that the gift is to the two, or the longer liver of them; but I think that that construction cannot prevail, and that the term "longer liver of them" was merely a repetition of the term "survivor;" and that in the sentence "for and during their joint natural lives, *or* the life natural of the survivor," the word "and" must be substituted for the disjunctive "or."

I am of opinion that it is a gift of an annuity to two persons to commence at a given period, and to continue during their joint lives and the life of the survivor, and that it is given to them as tenants in common and not as joint tenants.

The consequence is, that the legal personal representative of the deceased annuitant will be entitled to one moiety of the annuity until the death of the survivor.

Solicitors for the Petitioners: Messrs. *Boys & Tweedies.*
Solicitors for the Respondent: Messrs. *Swann & Tweed.*

V.-C. S. 1867 Jan. 14, 15, 16.

ATTORNEY-GENERAL *v.* BISHOP OF MANCHESTER.

Church Building Acts (58 *Geo.* 3, *c.* 45, 59 *Geo.* 3, *c.* 134, *and* 3 *Geo.* 4, *c.* 72)—*Conveyance by Trustee of a Charity to Church Building Commissioners—Consecration of Chapel as a Parish Church—Assignment of District by Order in Council.*

The trustee of a charity is not authorized by the Church Building Acts to convey to the Commissioners the private chapel of a charitable foundation held by him as a trustee for the benefit of the charity.

Such a conveyance was declared to be a breach of trust, and a reconveyance ordered, although the Commissioners had caused the chapel to be consecrated as a parish church, and had caused the parson who was chaplain of the charity to be appointed the incumbent, as of a parish church, and caused a district to be assigned to it as a parish church under an Order in Council.

The acts of public functionaries who exceed the bounds of their authority, by assuming a power over property which the law does not give them, whether they be a corporation or individuals, are treated as the acts of private persons dealing with property without legal authority.

IN 1833, there existed at *Manchester* a school for the deaf and dumb, managed by a committee of governors, under fundamental rules, some of which required that meetings of the governors should be holden on certain requisitions, *after fourteen days' public notice*, and that no new law should be made, nor any change made in existing laws, except by a specified majority at an annual or special general meeting of the governors after such notice. In 1834, the governors of the school, finding the buildings deficient in accommodation, appointed a committee to fix upon an eligible plot of land for the erection of a new building for the use of the institution.

Prior to 1818, a Mr. *Henshaw* died, having by his will bequeathed £20,000 for the endowment of a blind asylum at *Manchester*, in the expectation that other persons would, at their expense, purchase lands and buildings. In a suit, *Henshaw* v. *Atkinson* (1), the bequest was declared valid, and the administration of the charity thereby established was reserved. In 1833, the accumulation on the £20,000 had amounted to £47,000. In that year, at a public meeting at *Manchester*, a committee was appointed to ask for

(1) 3 Madd. 306.

subscriptions for the purpose of purchasing land and buildings, and the sum of £8700 was collected.

Negotiations took place between the two committees in reference to building the school and asylum on adjoining plots of land, and they resulted in a concurrence of opinion that that would be desirable. The governors of the school contracted for the purchase of a plot of land, a portion of which they offered to the subscribers to the asylum fund, and they, at a general meeting, accepted the offer "on the ground of economy, and as one chapel would serve both institutions," subject to the approval of the Court of Chancery. In the suit a state of facts was carried in before the Master, and it alleged that the land was desirably situated for the purposes of the asylum, and the plot adjoining the land on which it was intended to build a school for the deaf and dumb—that one chapel and one chaplain would be sufficient for both the institutions, and that expense would thereby be saved to each of them. A scheme for the administration of *Henshaw's* charity was, in July, 1835, approved by the Master, who in his report (which was afterwards confirmed) stated, as a reason for approving of buildings on the proposed site, "that one chapel and one chaplain would be sufficient for both institutions."

The scheme required that there should be trustees of the land and buildings, and a board of management of the asylum, and that fourteen days' public notice should be given of any proposed change in the rules of government. The land purchased—about three acres—on the north side of the road leading from *Manchester* to *Altringham*, belonged to Mr. *Trafford*, and the consideration originally was a perpetual rent-charge of $1\frac{3}{4}d.$ per square yard per annum, and on these terms the board of management of the asylum agreed to take one-half of the land, and a sum of money out of the subscriptions was invested in consols to meet the yearly rent-charge. In October, 1835, at a meeting of the said board, resolutions were passed, that the front elevation of the asylum should be the same as that adopted for the school, connected by the chapel (shewn in a drawing), and that a chapel connected with the Established Church should be erected for the joint use of the asylum and school.

The governors of the school concurred in the design for the erec-

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tion of a chapel. Building committees were appointed, and *Samuel Walker* was appointed treasurer, and *John Pooley*, *Thomas Fleming* (all deceased), and the Defendant, *John Bradshaw*, deputy treasurers of the chapel fund. The governors of the school transferred £494 4*s.* 10*d.* to the use of the trustees of the chapel fund, on the understanding that accommodation for attendance on divine worship should be provided for the inmates of their institution, and that it should participate in whatever advantages should arise from casual contributions of strangers attending the chapel. In March, 1836, the "stone, the first of a building to comprise an asylum for the blind, . . . and a school for the deaf and dumb, and a chapel for the joint benefit of both institutions"—being one entire and uniform structure, the chapel being in the centre—"was laid, the cost of the building being defrayed" by public benefactions. The board of management of the asylum paid £664 6*s.* 8*d.* to the trustees of the chapel fund, and donations were made by certain persons to that fund. The erection and fitting-up of the chapel cost £4600, part of which was borrowed from certain bankers.

After various meetings of the building committees and the chapel committee, at which resolutions for the purpose were passed, certain pews in the chapel were sold to the subscribers to the institutions, and the purchase-moneys paid to the trustees of the chapel fund. Other resolutions were passed in reference to the raising of funds on behalf of the chapel and the indemnifying of parties who had become liable for the money borrowed, and also in reference to the appointment of a curate. The chapel was opened for divine worship on the 10th of June, 1838, and the Bishop of *Chester*, in February, 1838, appointed the Rev. *Thomas Buckley* (who was a Defendant, and who had died since the filing of this information) to the temporary chaplaincy of the asylum, and licensed him as a curate to the warden and fellows (now dean and canons) of *Manchester*, the rectors of the parish within which the chapel was situated, but his stipend was to be paid by the committee of the asylum. An arrangement was come to, not by formal resolution binding on the charities, but acted upon up to 1854, that the management of the services and internal arrangements of the chapel should be carried on by certain of the pew-owners and the

congregation, in conjunction with persons appointed by the institutions. In 1838, public appeals were made for subscriptions to the funds of the institutions and the chapel, and they resulted in contributions which were appropriated to the expenses of the building of the asylum and of the chapel. In November, 1838, an arrangement was come to between the vendor and purchasers of the land above mentioned, that the rent-charge should be commuted for a gross sum, payable once for all, and that the land should be conveyed in three several lots, and accordingly, in November, 1838, one lot, on part whereof the asylum stood, was conveyed to the thirteen trustees thereof under the said scheme; another lot, on part whereof the school stood, was conveyed to the trustees thereof; and the remaining lot, on part whereof the chapel stood, was conveyed to the said *Samuel Walker*, *John Pooley*, *Thomas Fleming*, and the Defendant, *John Bradshaw*. The purchase-money in each case was expressed to be paid by the persons to whom the conveyance was made, and the conveyance in each case was made to those persons as joint tenants in fee; and, in reference to the chapel plot, it was declared that the land thereby "assured is purchased by the purchasers (naming them), as trustees for a certain chapel erected thereon, and that the sum of £249 14*s.* 9*d.* (the purchase moneys) was part of the funds belonging to the chapel." The deeds were duly enrolled in Chancery, pursuant to the *Charitable Uses Act*, 9 Geo. 2, c. 36. In January, 1839, the Bishop of *Chester* granted a license for burials in the vaults of the chapel.

In March, 1838, and February, 1839, Mr. *Buckley* was appointed secretary to both institutions, at an annual stipend, with residential furnished rooms in the building. In 1840, an organ was erected in the chapel, and the cost of it was in part defrayed by public subscription and in part by the board of management of the asylum, on condition that it should be under their exclusive control. Subsequently difficulties arose regarding the management of the affairs of the chapel, and committees of both institutions were appointed to examine the books as to the powers of the managing bodies, and, upon a report of the committees, the managing bodies resolved to pay off the debt owing upon the chapel. About the same time, the committee in whose hands the management of the chapel had been left, held many meetings with a view to adopt measures for the con-

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secration of the chapel, and their report stated, that, of two propositions submitted to the bishop, in whom it was proposed to vest the patronage of the chapel, he had elected the one, as the basis on which the consecration should be arranged, which proposed to endow the chapel with the sum of £1000, and pay to the minister thereof £5 per cent. per annum on the value of all the pews which should be let in addition to the reserved rents, which he was to receive from those which should be sold. No meeting of the board of management of the asylum was ever obtained to consider this report, and the committee of the school resolved that it did not feel itself competent to adopt the recommendation of the chapel committee; but, notwithstanding this, the said draft report was entered on the minutes of the asylum by Mr. *Buckley*, without any authority, and against his duty as secretary. The report was dropped, and never presented to the governors of either institution.

No formal appointment as chaplain of either institution was ever conferred upon Mr. *Buckley*, distinct from his appointment (above mentioned) by the Bishop of *Chester*. In his reports in 1849 and 1850, the chaplain, Mr. *Buckley*, bore "testimony to the interest and attention manifested by the pupils" in the religious instruction "it was his more especial duty to give." In 1852, Mr. *Buckley* discontinued his attendance at the asylum in the capacity of religious instructor of the inmates, alleging that he was curate of the chapel, and was under no obligation to render such instruction.

In 1848, the Defendant, the Bishop of *Manchester*, was consecrated to that see, and in 1849 he was elected president of the board of management of the asylum.

Ever since the opening of the chapel the entirety of the three galleries had been appropriated to the institutions for the accommodation of the inmates and officers thereof, but in 1850, meetings of the managing bodies were held with a view of converting portions of the galleries into pews, in order to raise money to discharge the debt existing upon the chapel. No special meeting, however, ever confirmed the resolutions. In 1853, further differences arose between the board of management of the asylum, and some of the pew-owners and members of the congregation, usually attending

the chapel, relative to the musical services and other things, and Mr. *Buckley*, taking part therein, resigned his secretaryship. In January, 1854, a meeting of the congregation was, at the instance of Mr. *Buckley*, held, at which the rights of the institution to the management of the chapel were impugned, and, in accordance with requests made at the meeting, several persons present became, for the first time, subscribers to the asylum, for the purpose of electing persons on the board to support their claims. The disputes continuing, a special meeting of the board of management of the asylum was summoned on seven days' notice for the 27th of February, 1856, to consider matters connected with the chapel. At that meeting, at which several of the new subscribers were present, the disputes were referred to three arbitrators, and they were requested to make full inquiry into all previous proceedings, and to recommend such plan as they might consider most desirable for the future management of the chapel in accordance with the original intention. On the 28th of February, the joint chapel committee of the two institutions passed a like resolution, adding, "without prejudice to the acknowledged rights and privileges of the two institutions," and they bound themselves to carry out the decision of the arbitrators. The committee of management of the school, without previous public notice, as required by the fundamental rules, concurred with the above resolutions. The arbitrators, *inter alia*, reported that when the chapel was originally proposed to be built, it was for the joint use of the two institutions, and that the intention of the promoters from the first was that the chapel should be consecrated as soon as the necessary arrangements could be made for that purpose; and they recommended that steps should be taken by the chapelwardens to procure as speedily as possible the consecration of the chapel, without expense to the two institutions; that two galleries should be reserved exclusively for the two institutions; that certain pews should be reserved for strangers; that the rents from the others should be paid to the incumbent; and that the institutions should be relieved from all expenses incident to the performance of public worship; and, assuming it to be within their province, they also recommended that the patronage should be vested in the Bishop of *Manchester*.

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On the 1st of October, 1856, the committee of management of the school, after previous meetings, agreed, but not in conformity with the fundamental rules, to the recommendations of the arbitrators; and on the 6th of October, 1856, the board of management of the asylum, without public notice, confirmed the said report.

Prior to and in January, 1857, the two institutions, out of the chapel funds, repurchased all the pews which had been sold, and discharged the debt due on the chapel. In 1855, on a proposal that the chapel should be consecrated under the 1 & 2 Will. 4, and the patronage vested in trustees to be appointed by the institutions, the Defendant, the Bishop of *Manchester*, objected to such a course on the part of the asylum, on the ground that the institutions would be placed in an inconvenient position, as the district would acquire parochial rights in the chapel; and recommended the obtaining of a private Act of Parliament for the consecration of the chapel, by which the rights of the charities might be preserved; but, subsequently to this recommendation, the above resolutions, in October, 1856, were passed, which proposed to vest the patronage in the bishop.

Acting upon those resolutions, the solicitor to the institutions delivered the conveyance of the chapel land to the solicitor to the Bishop of *Manchester*, and he, on the 22nd of November, 1856, wrote, in effect, to the Commissioners for building new churches, that the trustees of the two charities were desirous that a chapel (endowed to the satisfaction of the bishop), attached to those institutions, should be consecrated, and the patronage thereof vested in the bishop, under the 23rd section of 8 & 9 Vict. c. 70, and that he had prepared and forwarded a draft conveyance of the chapel and site, with a certificate of title, from the solicitor to the Defendant *Bradshaw*, with the goodness of which he was satisfied, and he asked that, as all the parties were extremely anxious that the matter should be carried out with as little delay as possible, the Commissioners would accept the draft at once.

The certificate above referred to, stated that the Defendant *Bradshaw* was the only surviving trustee of the plot of ground and chapel; that he had in himself a good and indefeasible estate of inheritance, free from incumbrances, and was prepared to convey

the same under the powers of the Church Building Acts, in order that the chapel might be duly consecrated for divine worship.

The secretary to the Commissioners on the 2nd of December, 1856, wrote to the solicitor to the bishop, stating that as he had approved of the title, the Commissioners would consent to accept the land mentioned in the certificate, but on the express understanding that they were not to incur any responsibility whatever, and he added, that as regarded the patronage of the chapel, it must be settled under the 23rd section of 8 & 9 Vict. c. 70, before the consecration, otherwise it would belong to the incumbent of the parish. By that section it was enacted, "that if before or during the building of any new church, or previous to its consecration, the bishop of the diocese, and the patron and incumbent of the parish in which such new church has been, or is intended to be, built, shall enter into an agreement in writing, that the right of nomination to such new church shall, on its consecration, belong to and be exercised by any body corporate, aggregate, or sole, or by any person or persons, such agreement shall be binding on such respective parties, their successors, heirs, and assigns, and they shall be compellable to fulfil the same."

The Defendants, the Dean and Canons of *Manchester*, by their answer, stated that they were the patrons of the parish in which the chapel was situate, and they denied that any agreement had been made between the bishop and themselves and the incumbent for vesting the patronage of the chapel in the bishop.

The Act 58 Geo. 3, c. 45, for building and promoting the building of additional churches in populous parishes, by section 33 enacted: "That it should be lawful for the Commissioners, under the Act, to accept and take any building or buildings fit to be used for or converted into such additional churches or chapels, and also any lands, tenements, and hereditaments, proper for sites of additional churches or chapels, not exceeding in quantity in any one place what might be sufficient for building of a church or chapel, providing a churchyard, and making a proper and sufficient access or approach thereto from any persons willing to give the same; and every such site, when conveyed to the Commissioners, and the church erected thereupon, and notice thereof given to the bishop of the diocese, should become for ever thereafter devoted to eccle-

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siastical purposes only, in order that the same might be consecrated by the bishop to public worship, according to the rites of the United Church of *England* and *Ireland*."

Sect. 36 enacted: "That it should be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, and feoffees in trust, committees, executors and administrators, and all other persons and trustees whomsoever, not only for or on behalf of themselves, their heirs, and successors, but also for and on behalf of *cestui que trusts*, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other person or persons; and to and for all *femes covert* who were, or should be, seised, possessed of, or interested in their own right, and for every other person or persons whomsoever who should be seised, possessed of, or interested in, any lands, grounds, and hereditaments, which should be set out and ascertained for any such site, to contract for, sell, and convey the same unto the said Commissioners, under the provisions of that Act; and all such contracts, agreements, sales, conveyances, and assurances, should be valid and effectual to all intents and purposes whatsoever; and all bodies politic, corporate, or collegiate, and all persons whomsoever so conveying as aforesaid, were thereby indemnified for or in respect of any such sale which he, she, or they, or any of them, should respectively make by virtue or in pursuance of that Act."

The 37th section provided a form of conveyance to the Commissioners, and enacted that all such conveyances and assurances should be valid and effectual in the law to all intents and purposes, and should be a complete bar to all estates tail, and other estates, rights, titles, trusts, and interests and incumbrances whatsoever. The 59 Geo. 3, c. 134, was passed to amend and render more effectual the former Act, and the 3 Geo. 4, c. 72, was passed to amend and render more effectual both the former Acts. By the 1st section of the last-mentioned Act it was enacted that it should be lawful for any and every body politic, corporate, and collegiate, and corporation aggregate or sole, or for any trustees, guardians, commissioners, or other persons, *having the control, care, or management* of any hospitals, schools, charitable foundations, or other public institutions, by any grant or conveyance signed by or

under the seal of such body or corporation respectively, to give, grant, and convey any messuages, buildings, lands, grounds, tenements, or hereditaments respectively, to be used as sites for churches or chapels, or for enlarging sites of churches or chapels, or for church or chapel yards . . . . and all such gifts, grants, and conveyances, should be made to the Commissioners, or such other person or persons as should be specified by the Commissioners under the said Acts, and this Act, to be used for the purposes thereof, and all such gifts and grants might be made and given without any valuable consideration whatsoever, and all conveyances and assurances made for carrying any such gifts or grants into effect should be valid and effectual in the law to all intents and purposes whatsoever . . . . and all bodies politic, corporate, or collegiate, and all persons whosoever so giving, granting, and conveying, as aforesaid, were thereby indemnified for or in respect of any such gift, grant, or conveyance which he, she, or they, or any of them, should respectively make or convey by virtue, or in pursuance, or for the purposes of the said Acts.

Sect. 2 set forth the form of conveyance, and concluded thus: "And all such conveyances and assurances shall be valid and effectual in the law to all intents and purposes, and shall be a complete bar to all estates tail and other estates, rights, titles, and interests and incumbrances whatsoever."

The Defendant *Bradshaw*, by his answer, admitted that he had in no wise the control, care, or management, of the institutions, or of the chapel, except such as might be legally vested in him as the surviving trustee under the deed of 1838. He disclaimed all interest in the matter in question, and claimed to be indemnified for costs.

By a deed dated the 5th of December, 1856, which recited the 58 Geo. 3, c. 45, 59 Geo. 3, c. 134, and 3 Geo. 4, c. 72, and which was in the form provided by sect. 2 of the last-mentioned Act, the Defendant *Bradshaw* (at the instance of his solicitor, who was also solicitor to the two institutions), "as surviving trustee of the land and chapel, voluntarily and without any valuable consideration," conveyed to the Commissioners for building new churches all the plot of land which had been conveyed by the deed of November, 1838, to *Walker, Pooley, Fleming* (all deceased), and

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himself, and on part whereof the chapel stood, and the chapel, with the appurtenances, to hold to them and their successors, "for the purposes of the recited Acts, and to be devoted, when consecrated, to ecclesiastical purposes for ever." The chapel was described as "all that building now and heretofore used as a chapel for the said two charities."

The Defendants, the Ecclesiastical Commissioners, were, by the 19 & 20 Vict. c. 55, the successors of the Church Building Commissioners, who accepted the conveyance under the 24th section of the 8 & 9 Vict. c. 70.

By a deed of the 26th of January, 1857, which recited that the committees of management of the two institutions were desirous that the chapel should be offered for consecration as and for a church; that the chapel with its site had been conveyed to the Commissioners, and accepted by them; and that endowment and repair funds had been vested in trustees; it was provided that one-third of the sittings in the church should be free, or let at such rents as the bishop should direct; and that the church, as to pew rents, should be subject to the provisions of the 1 & 2 Will. 4, c. 38.

By a writing of the 28th of January, 1857, reciting that a Petition had been presented by the Rector of *Stretford*, in which parish the new church was situate, Mr. *Buckley*, and certain members of the committees of management of the institutions, and certain pew-holders, who were desirous that the chapel should be consecrated; that the chapel and site had been conveyed as above-mentioned; that funds for endowment and repairs had been provided; that the bishop was satisfied that all the requirements preliminary to consecration had been carried out, and that he had agreed to accept the patronage; the bishop separated the chapel from all common and profane uses, and consecrated the same as *The Church of St. Thomas, Old Trafford;* directed that the church, as to pew-rents, should be subject to 1 & 2 Will. 4, c. 38; and reserved to himself and successors 2*s.* to be paid yearly at Easter, and 3*s.* for a visitation fee. The vesting of the patronage in the bishop was not sanctioned or authorized by any special resolution of either institution. No part of the endowment and repair funds was contributed by either institution. There was some difficulty in raising them, and Mr. *Buckley* contributed the sum

necessary to make up the amounts. On the same 28th of January, 1857, the chapel was publicly consecrated by the above title. Mr. *Buckley* was collated to the benefice; received the pew-rents, amounting to about £483 per annum; and denied that he was chaplain of either institution, or bound to perform any duties other than those of minister of the parish.

In March, 1857, the bishop, on a Petition by Mr. *Buckley* and others, purporting to act on behalf of the institutions, which recited that the chapel was provided for the use of the inmates and officials of the institutions in their attendance on divine service, and that divine service had been performed in it by the chaplain of the institutions up to the time of consecration, granted a faculty securing to the institutions two galleries. No declaration was ever made by the Defendants, the Commissioners, nor by their predecessors, that the patronage should be vested in the bishop, nor that pew-rents might be taken. The Defendants, the Commissioners, believed that they were not necessary parties to any agreement respecting the patronage of the chapel.

On the application of Mr. *Buckley*, in April, 1857, the Defendants, the Commissioners, in pursuance of the Act 13 & 14 Vict. c. 41, for the division of the parish of *Manchester*, prepared a scheme for the assignment of a district to the new church, and the same was afterwards submitted to Her Majesty in Council, and ratified by an Order dated the 31st of July, 1858, and published in the *Gazette* on the 13th of August following.

The 2nd section of the last-mentioned Act enacted that every district constituted under the provisions of the Act, becoming a new parish upon the consecration of a church therein, should be a parish for all spiritual and ecclesiastical purposes, and be thereupon invested with all the rights and incidents belonging to a parish by the common law; . . . and the church of each and every such parish should be a church and rectory, and the rectors thereof for the time being should be a body politic and corporate and have a perpetual succession; and the incumbent of such church should thereupon, without any further process or form of law, become and be such rector, and such rectory and parish should be and be deemed to be a benefice, with sole and exclusive cure of souls, to all intents and purposes.

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The date of the conveyance by *Bradshaw* was the 5th of December, 1856, and this information was filed on the 2nd of March, 1864, the Board of Charity Commissioners having, by an order dated the 4th of December, 1863, authorized the Relator, who was a member of the board of management, and one of the trustees of the asylum, and also president of the school, with the sanction of the Informant, to institute these proceedings for the purpose of establishing the right of the two charitable institutions to the possession of the chapel and of the land attached thereto.

By the 29th section of 3 Geo. 4, c. 72, it was enacted "that from and after the expiration of five years after the transfer or conveyance of any messuages, lands, grounds, tenements, or hereditaments, to the Commissioners, . . . for the use of any parish, as a site for any church, . . . whether such transfer or conveyance shall have been by gift or grant, . . . the said messuages, lands, grounds, tenements, or hereditaments, shall become and be and remain absolutely vested in such Commissioners; . . . for the purposes of the Acts, free from all demands or claims of any body politic or corporate, or person or persons whatever, and without being thereafter subject to any question as to any right, title, or claim thereto, or in any manner affecting the same." After the information was filed, Mr. *Buckley* died, and his executors were made Defendants, as was also the Rev. *Wm. Doyle*, whom the bishop had collated to the incumbency of the new church.

The Bishop of *Manchester*, by his answer, stated, that members of the boards of management of the institutions, in 1856 and 1857, had interviews with him, in reference to the consecration of the chapel, and that he endeavoured to dissuade them from carrying out the consecration in the manner proposed, and pointed out that the consequences of such consecration would be that a district would probably be assigned to the chapel, and that it would acquire parochial rights, which he considered as contrary to the original objects with which the chapel was built; but, notwithstanding such suggestions on his part, the said members persisted in their request, and, in compliance therewith, it was arranged that the chapel should be consecrated according to the regular course.

Mr. *Buckley*, by his answer, denied that he was ever appointed

chaplain of the institutions, and stated that he was the minister of the chapel.

The Informant prayed for declarations that, notwithstanding the writing of consecration, and the consecration thereby declared, the chapel was the property of the two charities, and that the said writing was ineffectual to transfer the freehold to Mr. *Buckley* and his successors; that the said writing, so far as the same affected to declare the patronage of the chapel to be vested in the bishop, and so far as the same declared the chapel to be duly consecrated pursuant to the Church Building Acts, and to be subject to the provisions thereof, and so far as it purported to reserve payments to the bishop, was invalid, and that, if necessary, the same might be ordered to be cancelled; that the order of Her Majesty in Council, of July, 1858, so far as the same related to the assignment of a district to the chapel, was unduly obtained, and that, under the circumstances, such order was beyond the true powers of Her Majesty, according to law, to make, and that the same might be declared to be invalid; and that the conveyance of the chapel, dated the 5th of December, 1856, was a breach of trust, and that the Commissioners might be directed to reconvey the hereditaments, as to one moiety thereof to the trustees of the asylum, and the other moiety to the trustees of the school, or otherwise for the benefit of the two charities.

The Informant also prayed for certain inquiries as to the value of the chapel, and that the Bishop and others might be decreed to pay to the institution what might be found to be such value; and for accounts of pew-rents received by Mr. *Buckley*, and Mr. *Doyle*; and moneys received by the bishop for granting the faculty, and that they might be decreed to pay to the institutions what might be found due; and for costs of the suit.

Mr. *Wickens*, and Mr. *Yate Lee*, for the Informant and Relator:—

The Church Building Acts were passed to enable conveyances of land for the erection of new churches. It is impossible to impute to the Legislature the intention of enabling trustees to convey to the Commissioners under those Acts a chapel or a church which had been devoted to charity. Upon the true construction of the Acts of Parliament, the conveyance by the Defendant *Bradshaw* was a

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breach of trust, and as the subsequent proceedings of the managing bodies of the institutions, and of the Commissioners, could not make it lawful, the Informant was entitled to all that he asked. [They were stopped by the Court.]

Mr. *Bacon*, Q.C., and Mr. *Bedwell*, for the Bishop of *Manchester*, the representatives of Mr. *Buckley*, the Defendant *Bradshaw*, and the Rev. *W. Doyle* :—

The chapel was built out of funds wholly independent of the charities, and Mr. *Buckley* was not the chaplain of the charities. There was no connection between the chapel and the charities. The pew-owners possessed the right of managing the chapel. It was their money which built it.

[The VICE-CHANCELLOR :—The land was paid for out of moneys subscribed by the public.]

The only right which the charities had was the right of free access to the chapel when the conveyance of the land was made to *Bradshaw* and others in 1838. The trustees held the land for the chapel, and they had nothing to do with the charities. It will be impossible to declare that the chapel is not now a parish church. All that has been done has been done according to law, and cannot be undone. The owners of the chapel directed *Bradshaw* to convey, and he performed his duty in doing so. It was necessary that the chapel should become a parish church, and no harm has been done by the conversion. The Acts of Parliament referred to authorize a trustee who may convey a site to convey a chapel already built. The trustee lawfully conveyed. He acted according to the wishes of the managing bodies. The Court cannot unconsecrate the church.

[The VICE-CHANCELLOR :—That is a matter with which this Court has nothing to do.]

But the chapel has, by consecration, become a parish church. The 3 Geo. 4, c. 72, s. 2, enables a trustee to convey any building to the Commissioners. This building was properly conveyed to and accepted by, the Commissioners. A district has been assigned by an Order in Council, and this Court has no power to interfere

with that Order, nor has it any power over the Commissioners to order them to reconvey. The trust for the chapel and for chapel purposes has been barred by this 2nd section, and the freehold is now vested in the incumbent and his successors.

Mr. *J. H. Palmer*, Q.C., and Mr. *Lindley*, for the Ecclesiastical Commissioners:—

It was clearly contemplated by the Legislature that the Commissioners might become possessed of property the title to which might be open to question, and therefore large and extraordinary powers were given by the Acts. The Commissioners have to shew that the conveyance of this property—a building adapted for church purposes—was fair, and within the provisions of the Acts. The Act of 1818 (58 Geo. 3, c. 45), by sect. 33, enables the Commissioners to accept buildings fit to be converted into churches, and also any hereditaments proper for sites.

And then, by sect. 37, all such conveyances shall be a complete bar to all estates tail and other estates, rights, titles, trusts, interests, and incumbrances whatsoever. The 3 Geo. 4, c. 72, gives additional powers, and enacts that all grants may be made without any valuable consideration. It was the intention of the Legislature that if the Commissioners should have questionable titles conveyed to them, they should not be questioned at all, and especially not after five years from the date of the conveyance. The 29th section is a special *Statute of Limitations*.

The section operates in the same manner as the *Statute of Limitations* (3 & 4 Will. 4, c. 27), and bars all claims to property conveyed for the purposes of a church, and its object is just what has taken place in this case, for this property was acquired by the Commissioners for public and sacred purposes. The Legislature considered that it would not be well to allow *cestuis que trust* to come to this Court long after the conveyance, and question the transaction.

At the date of the conveyance this unconsecrated building came within the words in this section, of "messuages, lands, grounds, tenements, or hereditaments. A building cannot be a chapel until it be consecrated: *Burns'* Ecclesiastical Law (1). This section

(1) Vol. i. p. 323, 9th ed.

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includes all the property conveyed, which in this case was not conveyed till after resolutions had been come to by the managing bodies of the institutions (whose proceedings were binding) for the consecration of the building. The Defendant *Bradshaw* had in every respect full power to convey this site and the building upon it so that it might become a church. There has been no violation of the words of the Acts. *Bradshaw* acted upon the wishes of all persons concerned in the property.

The information prays that the consecration and Order in Council may be set aside, and it is submitted that if any decree be made it will be necessary to go to the extent of the prayer.

The case of *St. Mary Magdalen College, Oxford* v. *Attorney-General* (1) shews that the *Statute of Limitations* will be applied to charitable bodies. The 29th section of 3 Geo. 4, c. 72, limited the period for commencing proceedings to five years, and as the conveyance was in December, 1856, and the information filed in March, 1864, there is no reason why these charities should not be held to be barred. It will be impossible to hold that the consecration was not according to law. The effect of consecration alone is that the building has become a chapel of ease to the mother church; but a district has been assigned under an Act of Parliament, and it cannot be held that there is not now a parish church.

Mr. *Pearson*, Q.C., and Mr. *Milne*, for the Dean and Canons of *Manchester*, asked for their costs.

SIR JOHN STUART, V.C.:—

This case is certainly one of very serious importance, upon public grounds.

The information complains that a chapel and a plot of ground devoted to the purposes of two charities, have been improperly conveyed to the Ecclesiastical Commissioners, and improperly dealt with after they got into their hands; and a decree is asked to set aside the conveyance, and to restore the property for those charitable purposes for which it was held.

The first question is, as to the condition of this chapel and plot of land at the time when the conveyance was executed, which is

(1) 6 H. L. C. 189. 3 Jur. N.S. 675.

impeached in this suit? The plot on which the chapel was built was one of three plots of land, each of which was vested in separate sets of trustees, upon different trusts, and for different charitable purposes. It appears very plainly that the chapel plot of land, held by the Defendant *Bradshaw*, was acquired for no other purpose than for the benefit of the two charities, for whose benefit the two adjoining plots of land were held upon trust. The history of the transaction puts that out of the question. It is important to advert to the scheme approved by this Court in reference to *Henshaw's Charity for the Blind.* Before that scheme was settled by the Master of this Court there existed at *Manchester* a charity for the benefit of the deaf and dumb, which was not subject to the regulations of this Court at all, and with which this Court had not interfered. It was a charity supported by public subscriptions, but no less a charity. Finding that there was that charity, and that it was necessary to approve of a proper mode for carrying into effect the objects of the charity for the blind, with which this Court was dealing, the Master reported that a scheme, recommended with reference to acquiring land, was important, because the other charity might, by combining its interest to that extent, have, for the purposes of both charities, one chapel and one chaplain. It is perfectly true that the scheme approved by this Court does not touch the chapel or the chaplain; but it is equally true that it was considered that for the due administration of the charity a chapel and a chaplain were, if not indispensable, certainly requisites of a highly important character. The fund out of which the chapel was built was provided by public subscriptions, and provided with a view to the benefit of both charities. The chapel was built on one of the three plots of land, and vested in trustees, and it was vested in them by a conveyance, in which they declare they are trustees of the chapel; and it is beyond all doubt, that it was the chapel of the institutions, and built for the benefit of the institutions, and that the chaplain was chaplain of the institutions. The deceased Defendant, Mr. *Buckley*, has, by his answer, stated that he was not chaplain of the institutions, but that he was chaplain of a chapel which was frequented by a congregation of which the inmates of the institutions were members, and that he was the minister. But that was a contest which ought not

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to have been raised, for Mr. *Buckley* said he believed that the blind asylum charity did pay for the furnishing of certain rooms in which it was anticipated at the time of the appointment that the chaplain would reside. Why did he not reside in them? He said it was owing to his previous marriage. That at least shews the intention that he should be a resident chaplain of the institutions, and not merely the chaplain of a chapel of which the inmates of the institutions were only members of his congregation. No doubt it is true that there were other members of his congregation—pew-holders—with whom he seems to have very much concerned himself in a way which has produced all this unfortunate litigation.

In his reports for 1848 and 1849, Mr. *Buckley* called himself the chaplain, and testified, as chaplain to these charitable institutions, to certain matters in the said reports. That settles the question of the position of the chapel, and of the chaplain who was appointed to the office, not only to perform divine service and to administer the rites of religion in the chapel, but to administer the consolations of religion, as resident chaplain, to the inmates of the charitable institutions.

The chapel being thus vested in trustees, along with a plot of ground, as property dedicated to charitable purposes—purposes in which the two charitable institutions were eminently interested, as an integral part of the purposes for which they subsisted, what is now complained of is, that the surviving trustee, in whom the chapel was thus vested, upon representations by the managing bodies—who had no right to deviate in any respect from the purposes for which the charities subsisted—was persuaded to convey the chapel and plot of ground in the shape of a gift, to the Ecclesiastical Commissioners, according to a form which treats him as a private benefactor making an endowment for the purposes for which the Ecclesiastical Commissioners existed. The Court has to deal with what requires most serious consideration—the acts of the Ecclesiastical Commissioners, and of Her Majesty in Council, and of the authorities acting under the statute for the division of *Manchester* into parishes. With reference to what is done by public authorities under the powers entrusted to them for public purposes, the law is now perfectly clear. Lord *Cotten-*

ham, in *Frewin* v. *Lewis* (1), had before him a case in which a public body—the Poor Law Commissioners—was dealing with the guardians of the *Holborn Union*—another public body. A bill was filed against the Commissioners and the guardians of the *Holborn Union* by two of the directors of the poor of the parishes comprised in the Union, impeaching the acts of the Commissioners as illegal and improper in regard to their interfering in some way with property which was vested in the guardians. The facts are not particularly important to be referred to, because it is only the law as laid down by Lord *Cottenham* that I wish to notice. Lord *Cottenham*, at p. 254, says: "I apprehend that the limits within which this Court interferes with the acts of a body of public functionaries constituted like the Poor Law Commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority." The question here is, whether the Ecclesiastical Commissioners and the trustee of this chapel and plot of ground exceeded their authority when they took from these charities their chapel and plot of ground, and turned the chapel into a parish church.

It was contended that the Ecclesiastical Commissioners did not exceed their authority, because, under the Acts of Parliament, power had been given to them to purchase sites and provide additional places of worship with a view to the public benefit, and that the trustee of this chapel and plot of ground was, within the provisions of the Act 3 Geo. 4, c. 72, justified in conveying the chapel for the purpose of a site for a place of worship, to be consecrated and dealt with as a parish church. The statute 3 Geo. 4, c. 72, contains two sections which are important in deal-

(1) 4 My. & Cr. 249.

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ling with the present case. The first section enacts that it shall be lawful for the Commissioners to take conveyances of buildings or lands to be used as sites, or for enlarging sites, for churches. The 29th section enacts, that after five years from the time when the Commissioners have taken such conveyances the property shall be theirs, free from all demands or claims of any person whatever. These sections deal with the taking and acquiring by the Commissioners of sites for additional places of worship. It seems to me that, upon all the rules of construction, the words in the 1st section, "sites for churches," must be construed in a wide and liberal sense, but that the 29th section, which deprives persons of rights not asserted within a certain time, must receive the strictest construction.

If the Court found a conveyance duly made under the first section, of a building already in existence and used as a church, it would not place a narrow construction upon the word "site," but hesitate to interfere with any transaction of that kind, particularly if duly conducted, without any violation of the rights of any person. But it is impossible to say that this statute, which enabled the Commissioners to take conveyances of property, was intended to sanction any conveyance made, *per fas aut nefas*, of a building for the site of a church, no matter whose property was taken away by such a conveyance. I cannot construe the words of the section in any such sense. I can only construe them as meaning that if a conveyance were duly and properly made, such property might be taken by the Commissioners. Suppose there were nothing in question here but the site of the building of the blind asylum, and the trustee of it had thought fit to convey that building as a site for a church, could it reasonably be contended upon the construction of this section, that it was authorized? Nobody would, I think, venture to say that such a transaction could be supported. But it is within the words of the section, because it enacts that any trustee of any charitable foundation may convey any building as a site for a church. I think that these words must be read in a reasonable sense, and as meaning "any trustee who can convey without violating his duty." There may be many cases in which trustees of charitable lands, not at all authorized to alienate them for any purpose, might, where no pur-

pose of the charity was contravened, wish to give and convey half an acre of the lands for a site for a church, if they could properly do so. But without the authority of these Acts they could not do that. If the trustee did not deprive the charity of any actual benefit, and if the conveyance was discreetly made, and without the contravention of any right, it would be a rational construction to sanction such a conveyance. But I do not feel warranted in holding that any conveyance by any trustee of any charitable foundation, whether the purposes of the charity are defeated in whole or in part, is authorized to convey the charity estate by the terms of these Acts. Managing bodies cannot lawfully in any way derogate from the rights of charitable foundations by such transactions. As to the 29th section, it was said that, rightly or wrongly, even if this conveyance is liable to be impeached as one of the most flagrant abuses of a trust that ever took place, this section enacts that, unless it is impeached within five years, the transaction cannot be disturbed, and that the property must be still held, according to the conveyance, free from the rights of any person whatever. According to the clear and plain words of this section, nothing but conveyances of sites for churches, or buildings for sites for churches, are within its scope; and this is not a case in which I can construe the words of the section in a wider sense than they plainly import, or so as to sanction what is shewn to be a breach of trust. It appears that by the conveyance two charitable foundations have been deprived of rights and benefits which were enjoyed by them, under trusts properly declared, and upon which the lands were held. The first section, in my opinion, gives no authority whatever to any trustee to commit a breach of trust by the form of conveyance which that section empowers; and it seems very plain that if the 29th section be read accurately it applies only to conveyances of sites for churches. But the claim of the Commissioners does not stop short of saying that if the trustees had had vested in them nothing but the mere building of the asylum occupied by the recipients of the charity, and they had conveyed that building as a site for a church, still after five years were passed the thing never could be questioned, and the asylum would have become the property of the Commissioners without any possibility of recovery.

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But here intervenes that consideration which was stated by Lord *Cottenham* to be the governing consideration, when inquiring whether a public body, such as these Commissioners, or any other public functionaries, have confined themselves within the duties confided to them. When they exceed these bounds their high position as public functionaries ceases to be regarded by the Court, and they can only be regarded as persons who take property to which they are not entitled. That is the only way I can treat the ill-advised act of these managing bodies, which was contrary to the remonstrances of the bishop, who told them they were interfering with the rights of these charities, and that they must have a private Act of Parliament to authorize that to be done which they desired. It does not appear that the bishop remonstrated with the Commissioners. When he found the managing bodies of the charities were about to deal with the property in this way, he ceased to remonstrate, and left them to take the responsibility of those acts which he thought improper.

It was said that, after all, these two charities have not been deprived of the benefits which they enjoyed in the chapel; that it is true the property was conveyed to the Commissioners; and that although it is no longer their chapel, yet it is a parish church, upon the terms that they shall have liberty and license to use two galleries for their inmates to attend the performance of divine service. That they have lost their chaplain is beyond all doubt, for the chapel of the chaplain has been made a parish church. It is not pretended that the Defendant, the incumbent of the chapel which has been improperly turned into a parish church, is, or can be considered in any sense to be, the chaplain of the institutions. These charities have been deprived of their chapel and their chaplain; and instead they have got two galleries in the church; and it is said that that is a commensurate benefit. Even if it were a commensurate benefit, it is not the thing which they had. There is no power in the managing bodies of these institutions to convert and to give away the property belonging to them; nor is there anything to justify the dealing with the property in a way contrary to the trust on which the trustees held it. Therefore, I can come to no other conclusion than that the conveyance of 1856, executed by the Defendant *Bradshaw* as the surviving trustee of

this chapel and plot of ground, was a conveyance to the Commissioners which he had no right to make, inasmuch as it was a breach of his trust; and which they had no right to take, inasmuch as the statute under which they were acting only intended that they should take property which could be rightfully and reasonably conveyed to them.

It is a consideration of some importance, that by the consecration, and by the Order in Council, this chapel, which was converted (improperly, as I think, by these proceedings) into a parish church, has had a district assigned to it, and has been used as a parish church, and banns have been published in it, and other things have been done which must be affected by the decree which I must make. But where public acts are done by public bodies, if they interfere with the rights of property in the way mentioned by Lord *Cottenham*, they must be considered only as the acts of private persons improperly dealing with property. I do not anticipate that anything will prevent the due operation of the decree. The Defendant, the Rev. *W. Doyle*, can no longer, however, be considered as the incumbent of a parish church; and as to the public in general, the annexing a district to a chapel which is the chapel of the deaf and dumb, and the blind, will not, I hope, produce any material consequences. As to the publication of banns at a time when the church had all the form of being a parish church, I cannot anticipate that any inconvenience of importance will ensue. But if there does, it will be the duty of those who have disturbed the rights of private property, by their acts as public functionaries, to have it set right in the best way that may be. The rights of the public are important, but it is no part of any public right to confiscate private property, or to take anything away from private persons or charitable foundations.

Declare that at the time of the conveyance of the 5th of December, 1856, the chapel and plot of ground were vested in the Defendant *Bradshaw*, as surviving trustee thereof, in trust for charitable purposes, in which the charity called *Henshaw's Charity for the Blind*, and the *Charity for the Benefit of the Deaf and Dumb*, were interested, and that the conveyance of the 5th of December, 1856, by the Defendant *Bradshaw* to the Defendants the Ecclesiastical

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Commissioners was a breach of trust, and that the same ought to be set aside, and decree the same accordingly. Declare that the Order of Her Majesty in Council, dated 31st of July, 1858, inadvertently interfered with the trust upon which the said chapel and plot of ground were held by the Defendant *Bradshaw* for the benefit of the said two charities, and ought not to operate so as to deprive the said two charities of the said benefits. Decree that the Defendant *Bradshaw*, and the Defendants the Rev. *William Doyle* and the Ecclesiastical Commissioners, and all proper parties, do convey, and concur in conveying, the said chapel and plot of ground to proper persons to be appointed trustees thereof, to hold the same upon the same trusts and for the same purposes as the same were held by the Defendant *Bradshaw*, under the indenture of the 14th of November, 1838, and order that the costs of such re-conveyance be paid by the Ecclesiastical Commissioners and the Defendant *Bradshaw*, and that such re-conveyance be settled in Chambers if the parties differ. Let there be a reference to Chambers to approve of proper persons to be trustees of the said chapel and plot of ground, to whom such conveyance is to be made, and also to approve of a scheme for the management of the said chapel. Liberty to apply, and order that the parties to this suit do bear their own costs of it.

Solicitors for the Relator: Messrs. *Johnson & Weatheralls*, agents for Messrs. *Kershaw & Bullock, Manchester.*

Solicitors for the Defendants, the Bishop of *Manchester*, the Representatives of Mr. *Buckley*, Mr. *Doyle*, the Dean and Canons of *Manchester*, and *John Bradshaw:* Messrs. *N., C., & C. Milne*, agents for Messrs. *Slater, Heelis, & Co., Manchester.*

Solicitors for the Defendants, the Ecclesiastical Commissioners: Messrs. *White, Borrett, & White.*

FORD *v.* OLDEN

V.-C. S.
1867
Jan. 24.

Mortgagor and Mortgagee—Sale of Equity of Redemption to Mortgagee—Bankruptcy of Mortgagor—Undue Influence.

A mortgagor in embarrassed circumstances, in May, 1864, conveyed his equity of redemption in the mortgaged property, under pressure, to the mortgagee, for a sum considerably less than its value, and in June following he was, on his own Petition, adjudicated bankrupt.

On bill by the assignee, the deed was set aside.

Observation on *Hickes* v. *Cooke* (1).

THE Plaintiff was the creditors' assignee of the estate of *George Marsh*, a bankrupt.

In January, 1859, *Marsh*, a grocer, at *Shirley*, near *Southampton*, conveyed to the Defendant, *George Olden*, his brother-in-law, a piece of land subject to redemption on payment of £400 and interest, and in June, 1863, this mortgage was transferred to *Richard Harrison*, subject to redemption on payment of the said £400, and an additional £100 which he advanced to *Marsh*, and interest. In October, 1863, *Marsh* conveyed other lands and certain cottages to the Defendant *Olden*, subject to redemption on payment of £500 and interest. On the 4th of May, 1864, *Marsh*, by a deed which recited the above deeds, and that the Defendant *Olden* had agreed to become the absolute purchaser of all the mortgaged property, conveyed the same to him for £1100. At the date of this deed there was due to the Defendant *Olden* £588 0*s.* 11*d.* in respect of his mortgage, and £150 for goods supplied by him to *Marsh*; and £510 8*s.* 4*d.* to *Harrison*, in respect of his mortgage. The sum due to *Harrison* the Defendant *Olden* covenanted to pay, and he gave *Marsh* a discharge for the sums of £588 0*s.* 11*d.*, £510 8*s.* 4*d.*, and £1 10*s.* 9*d.* (in part of the sum of £150), making together the purchase-money of £1100.

The Defendant *Olden*, by his answer, stated that he believed *Marsh* was, in April, 1864, in pecuniary difficulties, but he did not know, or suspect, that his affairs were on the 4th of May, 1864,

(1) 4 Dow. 16.

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so embarrassed as they afterwards proved to be, nor that he was insolvent. He stated that he pressed *Marsh*, in April, 1864, to pay or reduce the amount owing. He also stated that *Marsh* proposed to sell the mortgaged property to him for £1400; that he refused to purchase at that price; that *Marsh* then proposed that he should take it, subject to the mortgages, in satisfaction of his debt, and that he refused, as he believed it was not worth more than £1100, and that then the deed of 4th May was executed.

On the 20th of May, 1864, *Marsh* was sued for the recovery of a debt of £50, and on the 8th of June, 1864, he was adjudicated bankrupt on his own Petition. The Defendant also admitted that at the date of the deed *Marsh* was considerably indebted to creditors other than the mortgagee, and that he had very little property.

The evidence, on the part of the Plaintiff, shewed that the mortgaged property produced a rental of about £115 a year, and that it was worth £500 or £600 more than the mortgage debts.

The Plaintiff, in January, 1865, offered to the Defendant *Olden* to redeem the mortgages, but the offer was declined. *Marsh* deposed that at the date of the conveyance of the 4th of May, 1864, he was not apprehensive of bankruptcy, and that he did not execute the same with any fraudulent intention, nor for the purpose of defeating the just claims of his other creditors. His belief at the time was that his book debts would have been found sufficient to cover all his liabilities.

This bill was filed in April, 1865, for a declaration that the deed of May, 1864, was fraudulent and void, as against the Plaintiff and the other creditors of the bankrupt, and that it might be delivered up to be cancelled, and for consequential relief.

Mr. *Bacon*, Q.C., and Mr. *Cracknall*, for the Plaintiff, submitted that the transaction was fraudulent and void as against all the creditors. They were stopped by the Court.

Mr. *Dickinson*, Q.C., and Mr. *Beck*, for the Defendant, contended that, upon the evidence, no fraud was shewn, and that it was the

duty of the Plaintiff to establish fraud before he could ask the Court to set the deed aside.

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SIR JOHN STUART, V.C. :—

This transaction cannot be allowed to stand. The deed in question is impeachable upon principles of the highest importance in this Court. The mortgagor, *George Marsh*, was, at the date of the transaction with the mortgagee, insolvent, and, in the following month he was, on his own Petition, adjudicated bankrupt. It has been laid down by the editor of a valuable text book (*Powell* on Mortgages), without sufficient qualification, that a mortgagee may purchase from the mortgagor his equity of redemption. Lord *Redesdale*, in the case of *Webb* v. *Rorke* (1), says that the Courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. In the case of *Hickes* v. *Cooke* (2), in the House of Lords, it was said, that a lease obtained by the mortgagee from the mortgagor was more objectionable than the purchase of the entire equity of redemption. It is clearly laid down by Lord *Eldon* in that case, that the taking of a lease from the mortgagor by the mortgagee is objectionable. Why is a lease from a mortgagor to a mortgagee liable to be impeached, and a sale of the mortgaged property to be treated as a transaction which is unimpeachable? The same objection seems to exist as to both transactions. A mortgagor may be a man of wealth, and in a situation to make any contract he pleases with the mortgagee, but the principle upon which the Courts act is not that the mortgagor is unable to enter into a contract of this kind, but that the transaction ought to be looked upon with jealousy, especially when the mortgagor is a needy man, and when there is pressure, and inequality of position, and the sale has been at an undervalue.

In this case the mortgagor was in pecuniary difficulties, and owed a long arrear of interest to the mortgagee, which he could

(1) 2 Sch. & Lef. 661. (2) 4 Dow. 16.

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not pay. He was a small trader struggling under debts which he was unable to pay, and he was in the power of any creditor who might put pressure upon him, and it is clear that pressure was used by the mortgagee. The property is, upon the evidence, worth considerably more than the mortgagee paid for it. The sum of £1100 was only about ten years' purchase on the rental. The transaction must be set aside, and there must be a sale of the property, under the direction of the Court, and an account of what is due to the mortgagee for principal, interest, and costs—all that he can fairly claim must be paid to him—but he must pay the costs of the suit.

Solicitors for the Plaintiff: Mr. *W. J. Paterson,* agent for Mr. *W. Henry Mackey, Southampton.*

Solicitors for the Defendant: Messrs. *Park & W. B. Nelson,* agents for Mr. *G. B. Footner, Romsey.*

BEADEL *v.* PERRY.

V.-C. S.
1866
Nov. 22.

Light and Air—Mandatory Injunction—Rule as to 45°.

The Court will not, in an ordinary case, restrain the erection of a building the height of which above an ancient light is not greater than the distance from the light.

Where, pending the litigation, the Defendant had continued the building complained of, a mandatory injunction was granted on motion.

THE Plaintiffs were auctioneers and surveyors, carrying on business at, and were lessees and occupiers for terms of years of, No. 25, *Gresham Street*. The house was situate on the north side of the street, and at the rear were ancient windows, through which light and air had had access to the rooms on the first and second floors. At the rear of, and between the said house, and the back of the Defendant's premises in *Basinghall Street*, was a space, varying from eight feet six inches to ten feet five inches in width, covered over with glass, from near the sill of the Plaintiffs' first floor windows. The height of the Defendant's old rear, or south wall, was about thirty feet, and as the tops of the Plaintiffs' first floor back windows were not more than about eight feet below the top of the said south wall, the light entered them at an angle of forty degrees with the horizon. More than half the Plaintiffs' second floor windows were above the top of the said south wall. The Defendant's premises were of a considerable depth, and immediately inside his said south wall was a flat-roofed building of twenty feet in depth, while the main house was at a considerably greater distance from the Plaintiffs' house. On the 8th of October the Plaintiffs, for the first time, discovered that the Defendant, himself a builder, had commenced building an inner south wall, which was apparently intended to be the south wall of an extensive and lofty block of buildings, at a distance of about ten feet northwards from his old south wall, and in the course of that day it was raised twelve feet above the height of his old south wall. The Plaintiffs, immediately upon making the discovery, instituted inquiries, but had great difficulty in learning that the Defendant was the lessee of the premises in *Basinghall Street*, and that he was the person

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engaged in erecting the new building. On the 9th of October notice of the Plaintiffs' rights, in reference to the access of light and air, was, by their solicitors, served upon the Defendant, and they also gave notice that the Plaintiffs objected to the erection or continuance of any buildings which would interfere with such access; but, notwithstanding such notice, the Defendant proceeded with the erection of his new south wall. On the 10th of October a bill was filed for an injunction to restrain the Defendant from allowing to continue the said south wall of a height greater than that which would allow the access of light and air to the back windows on the first and second floors of the Plaintiffs' house in the same degree as they had enjoyed the same previously to the erection of the new south wall; and also for an injunction to restrain him from erecting or continuing the erection of any buildings at or near the rear of the Plaintiffs' house, so as to darken, hinder, or obstruct, the free access of light and air to the back windows thereof, as such access was enjoyed previously to the erection of the said south wall; and for damages.

In the Long Vacation an injunction was granted, and leave was given to move for a mandatory injunction, and this was a motion in accordance therewith. The Defendant had, in the interval, continued the building, but a motion to commit was refused.

The evidence on the part of the Plaintiffs was to the effect that the Defendant had raised his new wall to a height of fifty feet, and that if it should be allowed to remain at that height, the light and air to the Plaintiffs' house would be diminished and impeded, and the premises greatly injured in value.

On the part of the Defendant it was shewn that though he had raised his new wall twenty feet higher than his old south wall, yet that it was at a distance of twenty feet from the Plaintiffs' ancient lights.

Mr. *Malins*, Q.C., and Mr. *J. Napier Higgins*, for the Plaintiffs:—

The old south wall was, from the beginning, an absolute injury to the Plaintiffs' premises, and the Defendant has made that injury greater by this new erection. The Court has interfered in similar cases: *Dent* v. *Auction Mart Company*, *Pilgrim* v. *The*

Same, Mercers' Company v. *The Same* (1); *Martin* v. *Headon* (2); *Herz* v. *Union Bank* (3).

The effect of the evidence is, that the erection of the new wall has blocked out the light from the Plaintiffs' rooms, so that they cannot be used with the same comfort and convenience as they could be used before, and that is sufficient to entitle the Plaintiffs to the injunction now asked.

Mr. *Bacon*, Q.C., and Mr. *Swanston* for the Defendant:—

It is not according to the practice of the Court to grant a mandatory injunction upon an interlocutory application.

Should such an injunction be now granted, the extent of the Plaintiffs' right is to have the Defendant's new wall reduced by ten feet, so as to bring the angular height of the obstruction down to forty-five degrees; but where such an injury has been completed before the bill is filed, and the damage, as the evidence here shews, is not of a serious nature, the Court will not interfere at all, but leave the Plaintiffs to obtain damages from a jury: *Durell* v. *Pritchard* (4); *Robson* v. *Whittingham* (5).

SIR JOHN STUART, V.C.:—

It seems to me that where, opposite to ancient lights, a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obscuration of the ancient lights as to make it necessary for this Court to interfere by way of injunction.

The *Metropolitan Building Act* is framed on the principle that the height of a building on the opposite side of a street should not exceed the breadth of the street, that is, if the street be forty feet wide, the height of the building on the opposite side must not exceed forty feet. I have had means of ascertaining, from one of the most eminent Judges in the common law Courts, that, as a general proposition, the Courts of law are now disposed to take this view. It has been clearly proved in this case that, opposite to the Plaintiffs' ancient lights, the Defendant has built a wall

(1) Law Rep. 2 Eq. 238. 12 Jur. N.S. 238 (3) 2 Giff. 686. 1 Jur. N.S. 127
(2) Ibid. 425. 12 Jur. N.S. 425. (4) Law Rep. 1 Ch. 244. 12 Jur. N.S. 16.
(5) Ibid. 442. 12 Jur. N.S. 40

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very much higher than the distance between them and the wall, and to that extent the Defendant must, in my opinion, take his wall down. There must be a mandatory injunction to that effect.

Reference has been made to a supposed rule of the Court, that mandatory injunctions cannot properly be made, except at the hearing of the cause. I never heard of such a rule. Lord *Cottenham* was, so far as I know, the first Judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape. Looking at all the circumstances of this case, I feel that I am bound to make an order for a mandatory injunction. If I did not do so, the injury which has been inflicted upon the Plaintiffs, though partly before the bill was filed, would be continued. The right in these cases is legal, and the protection sought is of that legal right, and this Court ought not to go beyond it. The Defendant must be restrained from continuing the wall which has been built by him opposite to the ancient lights in the Plaintiffs' house, at a greater height above the Plaintiffs' ancient lights than the distance between it and those lights.

1867, Feb. 12. On appeal from the above decision, and also from the decision on the motion to commit, the Lords Justices ordered both appeal motions to stand to the hearing; the costs of appeal to be dealt with by the Vice-Chancellor.

Solicitors for the Plaintiffs: Messrs. *Kingford & Dorman.*
Solicitors for the Defendant: Messrs. *Harrison, Lewis, & Co.*

In re LAWTON ESTATES.

V.-C. S.
1866
Dec. 7.

Apportionment Act, 4 & 5 *Will.* 4, c. 22—*Lands Clauses Consolidation Act*—*Lands under Lease taken by Company.*

Where lands, subject to a settlement made before the *Apportionment Act* (4 & 5 Will. 4, c. 22), are taken by a company under the *Lands Clauses Consolidation Act*, and the dividends ordered to be paid to the tenant in possession, the *Apportionment Act* does not apply to the dividends, whatever may have been the nature and date of the leases under which the lands were held by the tenants.

UNDER the provisions of the settlement of the *Lawton* estates, dated the 17th of March, 1829, *William Lawton*, *Charles Bourne Lawton*, and *John Lawton*, were entitled to legal estates for life in succession in remainder, with remainders to the first and other sons of *John* in tail.

William Lawton died in March, 1831, and thereupon *Charles Bourne Lawton* entered into possession of the estates. He died in February, 1860, and thereupon *John Lawton* became tenant in possession, and he died on the 9th of June, 1864, leaving the Petitioner, *William John Percy Lawton*, his eldest son, who thereupon became tenant in tail in possession.

In April, 1831, the *Macclesfield Canal Company*, under their Act, purchased parts of the *Lawton* estates, and paid the purchase-money into Court. It was afterwards invested in consols (£407 11*s.* 9*d.*), and the dividends were, by an order made in April, 1836, paid to *Charles Bourne Lawton* for life, and, under a subsequent order, to *John Lawton* for life. *John Lawton* died on the 9th of June, 1864. The *Trent Canal Company*, under their Act, purchased, in 1829, parts of the same estates, for the sum of £1989 7*s.* 6*d.*, on which interest was paid to 1862 to the tenant for life for the time being. The canals became, under an Act in 1847 (with which the *Lands Clauses Consolidation Act*, 1845, was incorporated), the property of the *North Staffordshire Railway Company*, and by that company the £1989 7*s.* 6*d.* was, in 1862, paid into Court, and, by an order, invested in £2139 2*s.* 2*d.* consols, and the dividends paid to the tenant for life. The railway

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company purchased parts of the same estates, in 1847, for £8031 4*s.* 5*d.*, and this sum was, by order made in a cause in 1864, invested in £8729 11*s.* 8*d.* consols.

A sum of £77 1*s.* 9*d.* cash had accrued on the £407 11*s.* 9*d.*; £47 2*s.* 6*d.*, part thereof, previously to the death of *John Lawton*; and £29 19*s.* 3*d.*, the remaining part, since his death. Another sum of £157 14*s.* 4*d.* cash had accrued on the £2139 2*s.* 2*d.* since the death of *John Lawton*, and another sum of £641 12*s.* 7*d.* cash had accrued on the sum of £8729 11*s.* 8*d.* since his death.

The executrix of *John Lawton* claimed to be entitled to apportioned parts of these dividends, or sums of cash, which had accrued between the last payment to him and the day of his death, and which, in the aggregate, amounted to £139 19*s.* 2*d.* The lands represented by the sums of £407 11*s.* 9*d.* and £2139 2*s.* 2*d.* were purchased by the companies before the 4 & 5 Will. 4, c. 22, was passed. The greater part of these lands, and of the lands purchased by the railway company in 1847, were in the possession of lessees under leases dated the 25th of March, 1829, under a power contained in the indenture of settlement, and these leases did not expire till 1859; and the residue of these lands was, at the time it was purchased by the companies, held by tenants from year to year under parol demises.

Mr. *Bacon*, Q.C., and Mr. *J. W. Chitty*, for the Petitioner:—

The 2nd section of the Act 4 & 5 Will. 4, c. 22, refers to instruments executed after the passing of the Act, and the instrument to be referred to in this case is the settlement of 1829, and therefore no right to an apportionment of these dividends arises: *Cattley* v. *Arnold* (1). A parol demise from year to year is not a lease within the meaning of the Act. Money in Court cannot be considered as land for the purposes of the Apportionment Acts: *In re Longworth's Estate* (2).

Mr. *Craig*, Q.C., and Mr. *A. T. Watson*, for the executrix of the last tenant for life:—

The dividends are apportionable, because it is clear that the rents of the lands, if they had not been taken by the companies,

(1) 1 J. & H. 651. (2) 1 K. & J. 1.

would have been apportionable, and so would the rents of new lands purchased (if the funds now in Court had been so invested) have been apportionable, and it must be assumed that they would have been invested if a proper opportunity had offered. It is for the purpose of making such a purchase that interim investments in consols are made. Although it is true that the settlement of 1829 was made before the Act 4 & 5 Will. 4, c. 22, was passed, yet it appears that at the times when the lands were taken by the companies some of them were held under parol demises from year to year, that the rest were held on leases made under a power, and that these leases expired before the death of *John Lawton*, so that at his death the lands, if they had not been taken by the companies, would have been held either without the power, in which case the leases would have ended with his life, and consequently the rents would have been apportionable under the Act 11 Geo. 2, c. 19, or they would have been held under leases made under the power at a time subsequent to the Act 4 & 5 Will. 4, c. 22; and it is now settled that rents under leases made since that Act was passed, although in pursuance of a power conferred before the Act, are apportionable by sect. 2: *Lock* v. *De Burgh* (1); *Plummer* v. *Whiteley* (2).

[THE VICE-CHANCELLOR:—The 11 Geo. 2, c. 19, seems to have been intended to prevent the loss of rent by the determination of a tenant's obligation to pay it.]

If a tenant paid the whole rent to the remainderman, a proportionate part would be recoverable for the estate of the tenant for life as money received to his use. If the case were otherwise within the Act of Geo. 2, this is clear from the manner in which Lord *Hardwicke*, in *Paget* v. *Gee* (3), applied that Act to the case of a tenant in tail—not strictly a tenant for life—where the remainderman had received the entire rent for the current period. Here, however, the dividends which represent the rents are in *medio*, awaiting distribution by the Court. This case is wholly clear of the construction which has been put upon 4 & 5 Will. 4, c. 22, in *In re Markby* (4), that rent cannot be apportioned under the Act unless it be reserved by an instrument in writing,

(1) 4 De G. & Sm. 470.
(2) Joh. 585. See Jur. N.S. 1416.
(3) Amb. 198.
(4) 4 My. & Cr. 484.

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because, if the rent in this case had been reserved either by parol or in writing, but not under the power, it would equally have determined by the death of *John Lawton*, and would consequently have been strictly within the 11 Geo. 2. On the other hand, if it had been reserved under leases made under the power, and therefore in writing, it would have been apportionable under the 2nd sect. of 4 & 5 Will. 4, c. 22, inasmuch as the leases would have been made since that Act, and that has been held to be sufficient.

Further, in this case the investments in consols, and the orders for payment of the dividends to the successive tenants for life, have been made since the 4 & 5 Will. 4, c. 22, and therefore the payments of the dividends may be considered as accruing due under those orders, and consequently apportionable.

SIR JOHN STUART, V.C.:—

The question in this case is not one of leases, and therefore not of rent reserved under them. The instrument to be referred to is the settlement of March, 1829, because it is the instrument which gives the right to the dividends in question; the purchase-moneys were paid into Court, and invested in consols because the lands were compulsorily taken under Parliamentary powers, and not by reason of any power or trust in the settlement; and the dividends were ordered to be paid to the tenants for life, because they are the persons entitled to the rents and profits of the land under the settlement. But the orders of the Court are not instruments within the meaning of the *Apportionment Act* of the 4 & 5 Will. 4, c. 22, and therefore no right to any apportionment of these dividends arises.

Solicitors: Messrs. *Rickards & Walker.*

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V.-C. S.
1867
Jan. 31.

Bankruptcy of Plaintiff—Revivor by Assignees for Costs only.

The Court allowed the assignees of a bankrupt Plaintiff to revive the suit for costs only.

In May, 1861, a decree was made in this cause (1) in favour of the Plaintiff, with costs, and it had been carried out, except as to the taxation and payment of costs, by the Defendant. The Plaintiff having been adjudicated bankrupt, an application on behalf of the assignees in bankruptcy was made to the Registrar for an order to revive the suit as of course, but it was met with the objection that there could be no revivor for costs, and a desire was expressed that the matter should be mentioned to the Court.

Mr. *W. W. Cooper* submitted that the general rule that there could be no revivor for costs only, did not apply to this case, where the Plaintiff, who was entitled under the decree to his costs, had not died, but had been adjudicated a bankrupt. He referred to *Blower* v. *Morrets* (2); *Pemberton* on Revivor and Supplement (3).

See *Morgan's* Ch. Orders (4).

Sir John Stuart, V.C., said the assignees were entitled to an order to revive.

Solicitor: Mr. *A. D. Bird.*

(1) 3 Giff. 363: 8 Jur. N.S. 863, 1063 (3) Page 105.
(2) 3 Atk. 772. (4) Page 213.

followed Lobb by L.J. Ellison v Shaefe 24 W.R. 88, 20 L.T. 255.
overruled by V.C.M. - Sc. L.R. 5 Ch. 708.

V.-C. W.

1866

Dec. 15, 17, 24.

VISCOUNT HOLMESDALE *v.* WEST.

Will—Executory Devise—Letters-Patent—Grant of Dignity—Revocation by Codicil—Legal Estate for Life—Estate Tail—Leaseholds and Chattels—Shifting Clause—Defeazance of old Uses.

6 Eq 543, 10 Eq 209

Testatrix by will, dated in 1860, devised freeholds to the use of trustees and their heirs, upon trust for *E.* for life, for her separate use, without power of anticipation; and, after the death of *E.*, to the use of *C.*, the first son of *E.*, for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail male; with remainders in like form to the use of the third, fourth, and other younger sons of *E.* for life, and their respective first and other sons in tail male; remainders in tail general to the daughters of each of the above tenants for life respectively; with ultimate remainder to the use of the right heirs of the testatrix, with jointuring and other powers. She also bequeathed copyholds, leaseholds, and certain chattels to, and to the use of, the same trustees, as to the copyholds and leaseholds, "upon such trusts as would best correspond with those thereinbefore mentioned concerning" the freeholds, and, as to the chattels, to go with the mansion-house as heir-looms.

By letters-patent, dated in April, 1864, the barony of *B.* was conferred upon *E.* for life, and, after her death, upon *R.*, the second son of *E.*, and the heirs male of his body; and, in default of such issue, to the third, fourth, and fifth sons of *E.*, and the heirs male of their bodies respectively. The patent contained a shifting clause providing that, in certain events, the barony should go over.

Testatrix by a codicil dated in May, 1864, after reciting the grant of the letters-patent, and that it was her intention to settle the manors and hereditaments premises and effects, devised and bequeathed by her will, in a course of settlement "to correspond, as far as might be practicable, with the limitations of the barony," revoked the devise of the manors and hereditaments, and the gifts of the copyholds and leaseholds contained in her will, and in lieu thereof devised and bequeathed the freeholds copyholds leaseholds and said chattels, to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, and assure" the same "in a course of entail, to correspond, as nearly as might be," with the barony, in such manner and form, and with such powers, &c., as the trustees should consider proper, or as their counsel should advise:—

Held, on the question of the proper form of settlement to carry out the directions of the codicil, that the freeholds must follow strictly the limitations of the barony, and that

1. *E.* took a legal estate in the freeholds for life:

2. *R.* was entitled to the freeholds for an estate in tail male:

Seaman M. 12 Eq 280. 8 Ch 984

3. The leaseholds and chattels must go with the real estate, as far as practicable:

4. The shifting clause in the settlement must follow that in the letters-patent.

varied on appeal 4 H.L. 543,

THIS bill was filed on the 9th of March, 1866, by the Right Hon. *William Archer Amherst*, commonly called Viscount *Holmesdale*, and *Frederick Iltid Nicholl*, against the Hon. and Rev. *Reginald Windsor Sackville West*, the Hon. *Mortimer Sackville West*, the Hon. *Lionel Sackville Sackville West*, the Hon. *William Edward Sackville West*, and the Right Hon. *George John* Earl *De la Warr*, and *Elizabeth* Countess *De la Warr* Baroness *Buckhurst*, his wife, praying that a draft settlement to be prepared on the Plaintiffs' behalf might be settled by the Judge in Chambers, in order to carry into effect the second codicil of the Right Hon. *Mary* Dowager Countess *Amherst*, the testatrix in the cause.

By a decree in the cause it was directed that a proper settlement be approved of by the Judge of the freehold copyhold and leasehold estates and personal property, directed to be settled by the second codicil of the testatrix's will.

The Plaintiffs, as trustees under the codicil, had brought in a proposed form of settlement, and on the summons taken out for the consideration of that proposal, the matter was adjourned into Court for the determination of the Judge upon the below-mentioned questions.

The will of the Countess, dated the 21st of April, 1860, devised real estates in several counties, including the mansion of *Knole*, *Kent*, to the use of the Earl of *Verulam* and of *Bernard Hale*, and their heirs, during the life of the Defendant, the Countess *De la Warr* (sister of the testatrix), without impeachment of waste, but in trust for the Countess *De la Warr*, and so that the rents and income might be for her separate use, without power of anticipation; and after her death to the use of Lady *De la Warr's* eldest son, the Right Hon. *Charles Richard Sackville West*, commonly called Lord *West*, for life, without impeachment of waste; with remainder to the use of his first and other sons in tail male, with remainder to the use of the Defendant *Mortimer Sackville West*, the third surviving son of Lady *De la Warr*, for life, without impeachment of waste, with remainder to the use of his first and other sons in tail

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male. Then followed remainders in like form to the Defendant *Lionel Sackville Sackville West*, the fourth, and to the Defendant *William Edward Sackville West*, the fifth, surviving sons of Lady *De la Warr*, for life, without impeachment of waste, with remainders in each case to their respective first and other sons in tail male. Then came remainders in tail general to the daughters of each of the above tenants for life respectively, according to the above order; and divers other remainders over, with the ultimate remainder to the use of the right heirs of the testatrix. The will contained jointuring powers to the extent of £800 a year, and powers to charge portions for younger children to the extent of £10,000, reserved to the tenants for life, not to take effect until they were in possession, and so that the estates should not be charged at one time with more than £1200 a year for jointures, or more than £20,000 for portions. The testatrix then gave certain copyholds and leaseholds, and the furniture and effects at her mansion of *Knole* (except certain articles) to the same trustees; first, as to the copyholds and leaseholds, upon such trusts as would best correspond with those before mentioned concerning the freeholds; second, as to the furniture and effects at *Knole*, in trust that the same might go with the mansion in the nature of heir-looms, according to the trusts declared of the house, so far as the rules of law and equity would allow. She then gave all the £3 per Cent. Consols. standing in her name at her death, and two mortgage debts, to the same trustees, upon the same trusts as were declared by her of the moneys to arise by the sale of her estates under the power for that purpose in the will contained (these trusts being the usual trusts under a power of sale and exchange). The will contained several gifts of legacies besides the devise of the estates.

By letters-patent of the 27th of April, 1864, Her Majesty created the barony of *Buckhurst*, which was limited by the patent to Lady *De la Warr* for life, then to the Defendant *Reginald Windsor Sackville West*, her second surviving son, and the heirs male of his body; and, in default of such issue, in like manner to the third, fourth, and fifth surviving sons, and the heirs male of their bodies respectively. In the same letters-patent occurred a proviso, that if any person taking under the letters-patent should succeed to the Earldom of *De la Warr*, and there should upon, or at any time

after, the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, "then, and so often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr*, or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst*, if the person so succeeding to the earldom of *De la Warr* was dead without issue male."

After the date of these letters-patent, the Countess *Amherst* made a second codicil to her will, dated the 3rd of May, 1864, and after reciting that by her will she had devised her said real estates "to, or in trust for, my sister *Elizabeth* Countess *De la Warr*, for life, with divers remainders over, in a course of entail;" and reciting that by her will she had also given to trustees therein named, her copyholds leaseholds and effects at *Knole*, upon trusts which she correctly recited; and reciting that by the letters-patent Her Majesty had granted the dignity of a baroness "unto my said sister, Countess *De la Warr*" for life, "with remainder after her decease, of the dignity of Baron *Buckhurst* unto the Right Hon. *Reginald Windsor Sackville West*, now second surviving son of my said sister, and the heirs male of his body lawfully begotten, with other remainders over;" and reciting that it was her intention to settle the hereditaments, premises, and effects devised and bequeathed by her will, "in a course of settlement to correspond as far as may be practicable with the limitations of the said barony of *Buckhurst*;" and that deeds were about to be prepared for carrying into effect such settlement, but could not at present be completed; she continued—"I hereby revoke and make void the devise of the said manors and hereditaments, and the gifts of the said copyhold and leasehold premises and effects, contained in my said will, and in lieu thereof I give devise appoint and bequeath" all the freehold copyhold and leasehold hereditaments and all the furniture and effects, to and to the use of the present Plaintiffs, their heirs, &c., as trustees, "upon trust, as soon as conveniently may be after my decease, to convey settle and assure all the same manors and hereditaments, copyhold and leasehold premises and effects, *in a course of entail to correspond as nearly as may be with the limitations of the said barony of Buckhurst*, and the provisoes affecting the same contained in the letters-

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patent conferring the said dignity, in such manner and form, and *with all such powers provisoes declarations and agreements*, as the said" (trustees) their heirs, &c., "*shall consider proper, or as their counsel shall advise.*" She then gave her £3 per Cent. Consols, and her two mortgage debts to the same trustees, upon trust "to transfer or make over the same unto the trustees of the power of sale and exchange, to be contained in the said settlement so hereby directed to be made, to be held by them *upon the trusts thereby to be declared concerning moneys to arise by the exercise of such power*;" and, after giving a legacy, she concluded:—"Except as my said will is hereby altered, I confirm the same."

Lady *Amherst* died on the 20th day of July, 1864.

The questions argued before the Court were the following:—

1st. Whether, in the settlement to be made pursuant to the directions of the codicil, Lady *De la Warr* was to take a legal estate for life, or an estate for her separate use, with or without power of anticipation.

2nd. Whether the successive persons to whom, under the patent, estates tail were limited, should have their estate in the freeholds reduced to an estate for life, with remainder to their first and other sons in tail, in strict settlement.

3rd. Whether, if the estates should be so reduced, the tenants for life should have jointuring powers, and powers for charging portions for younger children upon the settled estates.

4th. What should be the limitations of the leaseholds and other chattels.

5th. In what way the shifting clause should be penned with reference to the shifting clause in the letters-patent.

6th. Whether the limitations contained in the will (subject to those introduced by the codicil) were or not, still in force.

Mr. *Willcock*, Q.C., and Mr. *Casson*, for the Plaintiffs, the Trustees.

The *Attorney-General* (Sir *John Rolt*), Mr. *W. M. James*, Q.C., and Mr. *Wickens*, for the Defendant, *Reginald West*:—

The language of the codicil is clear—that the estates are to be conveyed and assured "in a course of entail, to correspond as

nearly as may be with the limitations of the barony"—those limitations being, after the decease of Lady *De la Warr*, to *Reginald West* "and the heirs male of his body." The meaning of the codicil may be taken to be—"My intention is changed, so far as the creation of the dignity would naturally change it. I intend my estates to go, not to the objects mentioned in my will, I intend them to be measured and determined by the limitations of the dignity." The words are, not that the estates are to go with the barony so far as the rules of law will permit, but that the limitations of the estates are to correspond as nearly as possible with those of the barony. It may be that the testatrix intended to give power to the first baron to bar the entail. Even if she has given him an estate tail *per incuriam*, words must be found within the instrument to shew a clear intention to cut down the estate, in order to get over the effect of language which in itself is clear and distinct.

The principles enunciated in *Rochfort* v. *Fitzmaurice* (1), are in our favour: so are *Austen* v. *Taylor* (2); *Marshall* v. *Bousfield* (3); *Blackburn* v. *Stables* (4); *Trevor* v. *Trevor* (5).

But should the effect be to give *Reginald West* an estate for life only, with remainders over, the tenant for life will be entitled to jointuring and charging powers. No doubt there are cases in which the Court has said that under a direction to settle an estate in strict settlement, it does not follow that jointuring and charging powers will be intended—the difficulty having been to determine the extent of such powers, as in *Duke of Bedford* v. *Marquess of Abercorn* (6). But that difficulty does not arise here, for the testatrix has, by her will, defined the limits of the powers.

[*Seale* v. *Seale* (7); *Harrison* v. *Naylor* (8); *Jervoise* v. *Duke of Northumberland* (9), were also cited.]

Sir *Roundell Palmer*, Q.C., Mr. *G. M. Giffard*, Q.C., and Mr. *Pemberton*, for the third and younger sons of Lady *De la Warr*:—

The language of the codicil is, that the estates are to be settled

(1) 2 D. & War. 1, 20.
(2) 1 Eden, 361.
(3) 2 Madd. 166.
(4) 2 V. & B. 367.
(5) 1 H. L. C. 239.
(6) 1 My. & Cr. 312.
(7) 1 P. Wms. 290.
(8) 2 Cox, 247.
(9) 1 Jac. & W. 559.

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in a course of entail, to correspond as nearly as possible with the limitations of the barony. Now the *Buckhurst* title is inalienable; hence the plain meaning is that the estates are to go in strict settlement.

The effect of a contrary decision will be, to vest the chattels in the first tenant for life: *Rowland* v. *Morgan* (1). This could not have been the intention, otherwise why did the testatrix separate the *Buckhurst* from the *De la Warr* title? Then if, as to chattels, the strict words may be departed from, why not as to freeholds and copyholds? The mention of giving instructions to counsel shews that the gift is executory; and the construction is supported by the gift of the consols. Then, how would such instructions as these be carried out by a conveyancer? He would give an estate for life to the first taker, and he would not insert daughters of a first son before second and third sons, so as to interfere with the barony.

[They cited *Stanley* v. *Stanley* (2); *Higginson* v. *Barneby* (3); *Papillon* v. *Voice* (4); *West* v. *Errissey* (5); *Randall* v. *Willis* (6); *Trevor* v. *Trevor* (7); *Lord Glenorchy* v. *Bosville* (8); *Exel* v. *Wallace* (9), referring to *Bagshaw* v. *Spencer* (10); *Roberts* v. *Dixwell* (11); *White* v. *Carter* (12); *Woolmore* v. *Burrows* (13); *Lord Dorchester* v. *Earl of Effingham* (14); *Humberston* v. *Humberston* (15); *Lyddon* v. *Ellison* (16).]

With regard to the jointuring and leasing powers, the principles of *Duke of Bedford* v. *Marquess of Abercorn* (17) apply.

Mr. *Amphlett*, Q.C., and Mr. *C. Hall*, for Lady *Buckhurst*:—

The devise in the will is wholly revoked, and Lady *Buckhurst* takes a legal estate for life under the codicil.

The devise of chattels is revoked only as far as there is a bequest of heir-looms.

(1) 2 Ph. 764.
(2) 16 Ves. 491.
(3) 2 S. & S. 516.
(4) 2 P. Wms. 472.
(5) Ibid. 349.
(6) 5 Ves. 262.
(7) 1 P. Wms. 622.
(8) 1 Wh. & T. L. C. 1, 3rd Ed.
(9) 2 Ves. Sen. 318.
(10) 1 Ves. Sen. 142.
(11) 1 Atk. 607.
(12) 2 Eden, 365.
(13) 1 Sim. 512.
(14) 3 Beav. 180, *n.*
(15) 1 P. Wms. 332.
(16) 19 Beav. 565.
(17) 1 My. & Cr. 312.

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Mr. *Wickens*, in reply:—

[The VICE-CHANCELLOR referred to *Whateley* v. *Kemp* (referred to in *Howel* v. *Howel* (1)) and *Highway* v. *Banner* (2).]

The question is one not of implied, but of express intention. In marriage articles it must be assumed that it was intended to make a contract. The Court infers an intention, and says it was an integral part of the intention that the husband should not have the power of revoking the settlement. In this instance the words do not convey the intention that the estates should follow the barony, as far as the rules of law will permit. This is the fundamental distinction. The testatrix has pointed out the manner in which the settlement is to be effected: she has not pointed out the objects of the settlement.

With regard to the powers of charging and jointuring, the argument on the other side is as if, under the shifting clause, the estates were to go over on the death of the person succeeding to the earldom of *De la Warr* "without issue" of any kind. That is not the true construction of such a shifting clause as this, according to *Gardiner* v. *Jellicoe* (3).

Dec. 24. SIR W. PAGE WOOD, V.C., after stating the case, continued:—

The second is the principal and most difficult question in this suit.

The will is carefully penned as regards the settlement of the property, except perhaps as to the heir-looms. After the trust for Lady *De la Warr* during her life for her separate use, there follow strict legal limitations to the eldest, third, fourth, and fifth sons (omitting the second son) successively for life, without impeachment of waste in each case, with remainders to their first and other sons successively in tail male, with remainder to daughters in tail general. There are effective jointuring and portioning powers such as all but invariably occur in settlements of large estates.

(1) 2 Ves. Sen. 358. (2) 1 Bro. C. C. 584. (3) 15 C. B. (N. S.) 170.

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The only peculiarity is, that the second son, *Reginald*, is altogether unprovided for by the will.

The letters-patent vest the dignity in Lady *De la Warr* for life, then in *Reginald* the second son, in tail male, omitting the eldest son Lord *West*, and then in the third, fourth, and fifth sons, in tail male.

The codicil expressly revokes all the devises of the will as to the real estate, and vests the whole legal estate (which by the will was subject to the successive uses above-mentioned) in the present Plaintiffs, who were not the original trustees; and it also revokes the gift of the copyholds leaseholds and chattels, which was made to other trustees by the will, and gives them to the new trustees, the Plaintiffs, declaring the trusts to be to convey, so as to settle the whole property "in a course of entail, to correspond as nearly as may be with the limitations of the letters-patent as to the barony." Now before examining more closely the recitals of the codicil, and considering the authorities upon executory directions of this character, I must make a few observations on the peculiarity of the case with reference to the clauses in the will by which the tenants for life under that instrument are not impeachable for waste, and have jointuring powers and portioning powers.

I think I could not introduce any of the above advantages which the will secures to the tenants for life into the limitations directed by the codicil, should they be held to reduce the tenants in tail of the barony to tenants for life of the estates. I think one answer on this head applies to all; it is the answer given by the Vice-Chancellor in *Higginson* v. *Barneby* (1). These powers would diminish the estate limited in strict settlement. The Vice-Chancellor adds another reason, viz., the uncertainty of amount as to jointure and portions; and I think that reason also might apply here, because, though the amount the estate can bear is settled by the will which refers to the gifts here contained, it does not follow that, in the case of a peerage, more or less might not have occurred to the testatrix as the proper limit. The first reason, however, would be sufficient to exclude the powers in question, as well as the advantage given by the liberty to commit

(1) 2 S. & S. 516.

waste (in the will), notwithstanding the general clause in the codicil as to insertion of powers by trustees. I think the distinction is sound between powers for the equal benefit of all who succeed to the estate, such as powers of leasing, and of sale and exchange, and those for the benefit of some at the expense of others.

I am now approaching the great question as to whether a strict settlement should be directed, or a settlement pursuing simply the limitations of the letters-patent. I must, to avoid the labour of transcribing the decisions, most of which are collected in *Rochfort* v. *Fitzmaurice* (1), say that I consider the authorities to have determined: First, that in all cases of executory trust, the Court will disregard the technical language of limitations used by the testator, if satisfied that he has used it in a different sense from that which would be its ordinary legal construction, had the trust been declared by the testator himself: Secondly, that in cases of marriage articles, the nature of the instrument will at once authorize the Court to cut down words which would give an estate tail to the first taker, so as to reduce him to an estate for life with remainder to his first and other sons, it being supposed in the highest degree improbable that it would be intended to place the estate at once in the hands of the author or first taker in the settlement: Thirdly, this rule will not be applied to marriage articles, where the first taker is only tenant for life, and the next taker is tenant in tail, as in *Howel* v. *Howel* (2), and in *Highway* v. *Banner* (3), before Lord *Kenyon* (this case is mentioned without disapprobation by Lord *Eldon* in *Brudenell* v. *Elwes* (4)). For a similar reason the wife (if by articles technically construed she became tenant in tail), would not be cut down to an estate for life, where she took *ex provisione viri*, since she could not, under the statute of 11 Hen. 7, c. 20 (now repealed) bar the entail without the concurrence of the husband. The reason in all these cases was, that the settlement required the concurrence of two persons to bar the entail: Fourthly, as regards wills the same construction prevails as in marriage articles (where the trusts are executory) as to the power of moulding the technical language but something should appear in a will to indicate the intention

(1) 2 D. & War. 1.
(2) 2 Ves. Sen. 358.
(3) 1 Bro. C. C. 584.
(4) 7 Ves. 390.

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of the testator that the words should not be read in the ordinary technical sense, the nature of the instrument itself not being alone sufficient for this purpose. This distinction, I think, reconciles *Blackburn* v. *Stables* (1) with other cases from which it may appear to differ. Fifthly, the direction to settle as "counsel shall advise" has been thought very strongly indicative of an intention to settle strictly, and not to stand on the technical sense of the words used in declaring the trusts.

Had the words of the codicil in the case before me simply directed a conveyance of freehold estate to Lady *De la Warr* for life, with remainder to *Reginald* and the heirs male of his body, and this to be done by way of settlement in entail as counsel should advise, the case would not have been, even then, I think, perfectly clear, regard being had to some of the authorities (which give more technical effect to the words "heirs of the body," than to the word "issue"), and to the antecedent life interest; but still I should have inclined to the opinion that the limitations directed by the Court would be in strict settlement. But I think an important additional distinction exists in this case in the direct, and correct, recital by the testatrix of the limitations in the letters-patent, in the very words, so far as relates to the first estate tail, and her directing the conveyance of all the property (real and personal), in a course of entail, to correspond as nearly as possible with the "limitations of the letters-patent." I think the case is very different where the testator uses technical words in a careless or ignorant manner, and where he recites an instrument and desires a corresponding instrument to be executed. There are cases where a testator has referred to an existing settlement, and has directed the estate devised on an executory trust to be limited so as to go along with that estate; and in such cases the limitations have been cut down so as to tie up, and tie together, as long as possible, the two estates. But I think the case far stronger here; where, after actual recital of the limitations, corresponding limitations are directed for making the executory trusts correspond with the model given. The inference derived from requiring the assistance of counsel, may be well satisfied by the direction as to the leaseholds and chattels, the limitations of which, I think, under this codicil, will be moulded

(1) 2 V. & B. 367.

so as to make them go together with the freeholds; that being the clear intent—an intent which, I think, can be effected, notwithstanding the doubts expressed by Lord *Eldon*, in *Countess of Lincoln* v. *Duke of Newcastle* (1). In that case, the decision did really take away the chattels from an infant's representative, who, under *Vaughan* v. *Burslem* (2), would have been entitled had not the gift been executory. I had occasion to consider this in *Lord Scarsdale* v. *Curzon* (3).

Stress was laid in argument on the testatrix referring to her having by will devised her real estates in "a course of entail" —the estates by the will being settled according to strict settlement—and her directing by the codicil a settlement in "course of entail," to correspond with the limitations of the patent. But it will be observed, that the words "course of entail," may well refer to the totally different course of devolution in the two instruments; the first, introducing Lord *West*, who is excluded by the letters-patent, and excluding *Reginald*, who is the first taker in tail under the letters-patent. The testatrix may well, therefore, speak of the different "courses" of entail, with reference to the line of limitation, and not merely to its method. On the one hand, if you follow her words strictly—"according to the limitations of the patent," you create an estate tail which cannot be barred without Lady *De la Warr's* concurrence—you enable the peer to provide for his wife by her right of dower, for his children by his power to cut timber (which is given by the will, in addition to jointuring and portioning powers to every tenant for life), and thus you place the estate in the condition in which most large estates come to be held—being subject to a life estate, and then to a series of entails in remainder; but not capable of being barred by the first taker alone. By departing from the words of the codicil, you reduce each peer to a life tenancy without power to provide for wife or child; and this without any such direction as in the case of *Lord Dorchester* v. *Earl of Effingham* (4), referred to in the note to *Knight* v. *Knight* (5), for closely connecting the title and estates.

I am of opinion, therefore, that the freehold estates should be

(1) 12 Ves. 218, 238.
(2) 3 Bro. C. C. 101.
(3) 1 J. & H. 40, 66, 67.
(4) Coop. G. 319.
(5) 3 Beav. 180.

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limited according to the limitations of the patent, and answer the several questions which have been argued, thus:—

1. I think Lady *De la Warr* must take the legal estate for life under the codicil, the devise in the will being wholly revoked.

2, and 3. I think the settlement must follow the limitations of the letters-patent.

12 Eq 205

4. I think the chattels and personalty should be limited so as to go with the real estate, as far as practicable. Lord *Cottenham's* view in *Rowland* v. *Morgan* (1), does not differ from this as to executory trusts.

5. I think the shifting clause should follow the limitation of the letters-patent. Whatever be the validity of the limitation as to the peerage, it will be perfectly good as a shifting clause of the estates tail.

6. I think the actual revocation by the codicil of the devises to uses in the will, and the gift to new trustees for limited purposes not exhausting the fee, defeat the old uses. The case is stronger than *Holder* v. *Howell* (2), and cannot be aided by *Lord Carrington* v. *Payne* (3).

I have not forgotten, of course, that the circumstance of the peerage being inalienable, favours the view of a strict settlement; but after all, the property cannot be so tied up as to be inalienable, and I think that the recital of the peerage limitations—the direction to make the freehold limitations correspond with them—the inconveniences of cutting down the owner of the barony to a life estate impeachable for waste, and without power of creating a jointure or portions—the existence of a previous life estate which prevents any immediate destruction of the remainders except by the concurrence of Lady *De la Warr*—on the whole justify the Court in construing the words of limitation in the executory trust according to their ordinary signification.

Solicitors for the Plaintiffs, and for Lady *Buckhurst:* Messrs. *Nicholl, Burnett, & Newman.*

Solicitors for the various Defendants: Messrs. *Pinniger, Rose, & Wilkinson;* Messrs. *Pemberton, Meynell, & Pemberton.*

(1) 2 Ph. 764. (2) 8 Ves. 97. (3) 5 Ves. 404.

EASTWOOD *v.* LOCKWOOD.

V.-C. W. 1867 Jan. 22, 30.

Will—Construction—Estate Tail divested by subsequent Clause—"Death" when read as "Death without Issue"—"Next Surviving Son."

Testator, after a devise of all his real and personal estate upon trusts for the maintenance and education of each of his children, *John*, *William*, *Benjamin*, *Joe*, *George*, *Tom*, *Jane*, and *Hannah*, until the youngest child, *Hannah*, should attain twenty-one, with a direction to accumulate the residue in the meantime, devised lands *A.* to trustees upon trust for his son *John* and the heirs male of his body; lands *B.* in like manner to his son *William* in tail male; lands *C.* to *Benjamin*; lands *D.* to *Joe*; and lands *E.* to *George*, in tail male respectively. He then directed that "in case any of my said sons shall depart this life during the minority of my said daughter *Hannah* as aforesaid, *or* in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share shall be divisible according to the provisions of this my will," the share or shares of him or them so dying should go, accrue and belong "to my next surviving son according to the seniority of age and priority of birth," in like manner as his or their original shares.

John died in the lifetime of *Hannah*, leaving issue in tail:—

Held, on the construction of the will, that upon the death of *John*, his estate tail became divested, notwithstanding his leaving issue, and went over.

The testator having, in the will, correctly arranged the names of his sons in a descending order of birth:—

Held, that by "next surviving son," was meant the "next younger" and not the "next elder" surviving son.

BENJAMIN LOCKWOOD, by his will, dated the 12th of February, 1847, devised and bequeathed to his wife and three other persons all his freehold and leasehold estates, whatsoever and wheresoever, and all his personal estate, whatsoever and wheresoever, upon trust to permit his wife (with his children) to reside upon that part of his estate which was then in his own occupation rent free, and to receive the rents and profits of any part thereof which she might underlet for and towards the maintenance and education of his children, until his youngest child, *Hannah*, should attain twenty-one, if his wife should so long live; and from and after the decease of his wife, during the minority of *Hannah*, the same estate was to be and remain upon trust for the benefit, advantage, and bringing up of all his children, until his daughter *Hannah*

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should attain twenty-one. As to all other (*sic*) his freehold and leasehold and personal estates, whatsoever and wheresoever, he directed and declared that the whole, and every part thereof, should be held by his said trustees upon trust to receive the whole of the rents and profits, and apply a sufficient portion for the further and better maintenance, education, and advancement of each of his children, *John, William, Benjamin, Joe, George, Tom, Jane,* and *Hannah;* and to place out at interest, upon real or leasehold security, at their discretion, the residue, to accumulate till his said youngest daughter attained her age of twenty-one years; and upon further trust, as soon as his youngest daughter attained twenty-one, to sell every part of the then residue of his personal estate (except his leasehold property at *Hazle Grove*), and stand possessed of the proceeds upon trust to pay to his said daughters *Jane* and *Hannah,* the sum of £300 each, for their sole and separate use; and as to the residue of his personal estate (except as aforesaid) upon trust to pay the same to his two sons, *Tom* and *George,* in equal shares.

The will then proceeded in the following words:—"And as to, for, and concerning a portion of my real estate, consisting of" [The will here described particulars of property which may be designated as *A.*], "I do hereby will, direct, and declare, that the same, and every part thereof, shall go to, and be held and taken by my said trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust for my son *John* and the heirs male of his body lawfully to be begotten, subject nevertheless to, and chargeable with, the payment of one-half of the annuity hereinafter (*sic*) mentioned." The testator then gave, by similar words, another portion of the real estate (designated as *B.*) to *William* in tail male, subject as before; and three other portions (designated as *C. D.* and *E.*) to *Benjamin, Joe,* and *George* respectively, in tail male, but free from any charge; and concluded his will as follows:—

"Provided always, and I do hereby declare that, in case any of my said sons shall depart this life during the minority of my said daughter, *Hannah,* as aforesaid, *or* in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share shall be divisible according to the

provisions of this my will, then I direct that the share or shares of him or them so dying shall go, accrue, and belong to my next surviving son, according to the seniority of age and priority of birth, in like manner as his or their original shares, such surviving son taking the share only of the brother so dying as aforesaid, and upon the same trusts."

The testator died on the 2nd of March, 1847, leaving the eight children above-named. The six sons were born in the order in which their names were first mentioned in the will, and as stated above. *Hannah*, the youngest child, attained twenty-one on the 7th of May, 1866. In the meantime the widow, and four of the sons, had died. The widow died in 1849. *William* died on the 18th of April, 1852, an infant, and without having married. *Joe* died on the 8th of April, 1857, an infant, and without having married. *John* died on the 17th of October, 1861, adult and intestate, leaving a widow *Mary*, and only son *Ben*, his heir in tail male and heir-at-law, and without having barred his estate tail. *Benjamin*, having barred his estate tail in favour of himself in fee, died on the 3rd of March, 1866, having devised lands *D.* (bequeathed to *Joe*), and lands *C.* (bequeathed to himself), and certain other lands not derived from his father's will, to his brother *George* and his heirs; and all the residue of his real estate to his brothers *Tom* and *George*, as tenants in common in fee. *George* had also barred his estate tail in favour of himself in fee.

The bill was filed (originally on the 29th of January, 1866, before *Benjamin's* death) by the surviving trustee and executor of the will, against *Ben Lockwood* the infant, *Mary*, *Benjamin*, *Tom*, and *George Lockwood*, for declarations as to the rights of the Defendants.

For *Ben* and *Mary Lockwood* it was contended that upon the true construction of the will, and in the events that had happened, *John* took an estate tail in lands *A.*, and also (as the testator's heir-at-law), took the reversion in fee expectant on the failure of his estate tail in lands *A.*; and that he acquired similar estates in all the hereditaments which accrued to him by survivorship (*Mary* claiming dower). Also that, upon the death of *William*, lands *B.* passed under the will to *John*, as being the testator's *then next surviving son according to seniority of age and priority of birth.*

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George and *Tom Lockwood* insisted that, on *William's* death, lands *B.* passed to *Benjamin*, as the testator's next surviving son, according to the terms of the above clause, for an estate in tail male, and that on the death of *John*, in the minority of *Hannah* (notwithstanding that *John* had left issue male now living), lands *A.* passed to *Benjamin* for a like estate (enlarged by him to an estate in fee), and that *George* and *Tom* were now, under the will of *Benjamin*, entitled to the said lands as tenants in common in fee.

George Lockwood insisted that he became entitled to lands *E.*, and that, either under the testator's will, or the will of *Benjamin*, he had also become entitled to lands *D.*, for an estate in tail male.

Mr. *G. M. Giffard*, Q.C., and Mr. *T. C. Wright*, for the Plaintiff, and the Defendants, *Ben* and *Mary Lockwood*:—

On behalf of the infant son and widow of *John*, we contend that the gift to *John* was not cut down by the subsequent proviso, by reason of his death during the minority of *Hannah*. The true construction of the clause is, that "death during the minority of *Hannah*" means "death without issue during the minority of *Hannah*," the word "or" meaning *videlicet*.

The intention of the testator, as it is to be gathered from the whole will, was, not to derogate from the clear gift of an estate tail to each of his sons: *Abbott* v. *Middleton* (1); where Lord *St. Leonards* reviews the authorities.

Any other construction will render the prior gift of the estate tail unmeaning. If by death in the lifetime of *Hannah*, the testator did not mean "death without issue in the lifetime of *Hannah*," he would be simply re-introducing an event for which he had already provided, by giving *John* an estate tail, which on his death would descend to his heir-in-tail. There would be two inconsistent directions in the will; and in all such cases, a construction is to be adopted which will not cut down a clear estate tail: *Spalding* v. *Spalding* (2).

We further contend, that upon *William's* death lands *B.* passed, under the proviso, to *John* as "the next surviving son according

(1) 7 H. L. C. 68, 101. (2) Cro. Car. 185.

5 Jur. (N.S.) 717.

to seniority of age and priority of birth," and not to *Benjamin*; "next" meaning "next elder," and not "next younger" son; *Langston* v. *Langston* (1).

As to *Joe*, it is so uncertain who, upon his death, the next surviving son was, that we say lands *D.* are undisposed of.

Mr. *W. M. James*, Q.C., and Mr. *C. C. Barber*, for the Defendants, *Tom* and *George Lockwood*:—

We claim under the proviso, as defeating the former estate, in the event of the death of either son in the lifetime of *Hannah*. The words are clear; and their meaning is strengthened by the alternative. In this will death cannot mean death without issue, for the insertion of the alternative shews that another contingency is meant, namely—death even leaving issue. All the learned lords in *Abbott* v. *Middleton* say that no considerations of hardship or apparent capriciousness are to interfere with a clear gift. And see the observations of Lord *Wensleydale* (2), who, with Lord *Cranworth*, was against the decision of the Master of the Rolls, Lords *Chelmsford* and *St. Leonards* supporting it.

On the other point, on which we say that "next" means "next younger" surviving son, *Langston* v. *Langston* has no application; for there the words "and every other son" occurred, which do not appear here. If we are right on the first point, this contention is immaterial, except as to *George's* share of lands *D.*

Mr. *Giffard*, in reply.

Jan. 30. SIR W. PAGE WOOD, V.C. (after stating the facts, continued):—

I have very carefully considered the case of *Abbott* v. *Middleton* (3), and the authorities there cited, but I feel compelled to say, that this will is too plain to admit of any such construction as was adopted there, with reference to the estate which

(1) 2 Cl. & F. 194. (2) 7 H. L. C. 113. 5 Jur. N.S. 721.
(3) 7 H. L. C. 68. 5 Jur. N.S. 717.

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had become vested in the children of the testator's son, and which was held not capable of being divested by the words which were there used. Several very able Judges differed in opinion upon the construction of that will, but the authorities cited by Lord *St. Leonards* simply go to this: If you have a will in which a testator has used a manifestly elliptical expression, an expression which cannot have any sense given to it, according to its direct and immediate import—it is, nevertheless, right to conclude that the testator has a meaning in his words, and that meaning must be ascertained, if possible.

One of the earlier cases of that description is, where an estate tail is given to *A.*, and if *A.* die, over. Some meaning must be given to these words: death is certain, and the testator must have meant something more than the mere fact of death by the words "if *A.* die." One of the rules which in those older times was very much relied on, and which still continues to be a rule of the Court, is, that every limitation shall take effect by way of remainder that can so take effect. According to this rule, the imperfect expression "if he die," was held merely to imply the remainder of the estate upon *A.'s* death. On *A.'s* death, therefore, without issue, death itself being certain, and the estate being an estate tail, it was held that the land passed over.

Luxford v. *Cheeke* (1) also depends on the rule that words shall be construed as operating by way of remainder if they can reasonably be so construed, regard being had to the will. Of the same class are *West* v. *Erisey* (2), and other cases, where there are words which seem to import a contingency, but which really only point to the limitation of a remainder.

One of the strongest cases of this class is *Gulliver* v. *Wickett* (3), where a man gave an estate "to the child of which *A. B.* is *enceinte*," in tail, and in the event of that child dying without issue, over. It seemed, at first sight, as if it were necessary that the child should come into existence, and die without issue. But the truth was, that *A. B.* was not *enceinte* at all. The statement in the books is—that the preceding estate being out of the way in any mode whatever, the remainder will take effect.

The strongest case cited in favour of applying a similar con-

(1) 3 Lev. 125. (2) 1 Bro. P. C. Toml. 255. (3) 1 Wils. 105.

struction to this will is that of *Spalding* v. *Spalding* (1), which goes a considerable step further. But it appears to me that the decision in that case was come to, as Lord *St. Leonards* admits in the course of his discussion of the authorities (2), on the terms of the ultimate remainder over, which made the matter almost too clear for argument.

The earlier portion of the will in *Spalding* v. *Spalding* would have brought the case, to a certain extent, near this; there was a gift in tail in remainder after an estate for life, and, if the donee in tail died during the lifetime of the tenant for life, a gift over. In such a case, there is not the necessity of considering whether the testator is using an elliptical expression, because he has not fixed the period of death alone, he has fixed the period of death during the life of a particular person. There the Court decided, on the terms of the ultimate remainder over, which was to arise on all the children dying without issue, that dying in the lifetime of the tenant for life was meant to be dying without issue in the lifetime of the tenant for life. I consider that the case turned on the limitation of the remainder over, though Lord Chief Justice *Hale*, as Lord *St. Leonards* observes, puts it (3) simply on the ground of the improbability of the testator having intended anything else than a remainder, inasmuch as if he had meant to defeat the estate tail first given to one of his sons, he would have passed the estate either to his daughters, or to some of his collaterals.

I apprehend the only sound conclusion we can come to in construing a testator's words is this: if we find from the expressions he has used that there is a clear and distinct gift of an estate to one child as tenant for life, with remainder to his children, and the gift over is in terms which do not expressly divest the estate of those children, although there is nothing in the language which distinctly leads to that result, we may, nevertheless, hold that the subsequent estate is to take effect by way of remainder and not by way of displacement of the previous estate. Lord *St. Leonards* thought that *Spalding* v. *Spalding* was a stronger case than *Abbott* v. *Middleton* (4), then before him, inasmuch as in *Spalding* v. *Spalding*, an estate tail was given to the first taker, the issue

(1) Cro. Car. 185.
(2) 7 H. L. C. 107.
(3) 1 Ventr. 230.
(4) 7 H. L. C. 68.

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taking only through him; and the Court might, with greater reason, have been led to displace that estate entirely, upon the occurrence of some event personal to the first taker, than to displace the estate of some third person, his children for instance, upon the occurrence of such an event.

I think the language of Lord *Hale* is sufficient to justify me in observing that in all these cases the Court will look at the position of the testator, not only with reference to the property in question, but with reference to the objects he has in view.

In one class of cases, of which *Emperor* v. *Rolfe* (1) and *Hope* v. *Lord Clifden* (2) are examples, we know that there is one rule of construction, where the testator is dealing with children, and another where he is dealing with strangers. At the same time, if the testator has used plain and clear language, it is manifest that the Court must act upon that language, and that it is not at liberty to create a difficulty in order that it may have recourse to the circumstance of the relationship between the donees and the testator, as a ground for coming to a conclusion different from that to which the ordinary sense of the words would lead.

In this case, strange as it may seem that the testator should, throughout his will, have omitted this particular provision, it does appear to me to be the only reasonable conclusion, that the testator really forgot one state of circumstances, and, coming to that conclusion, I can only suppose that this particular contingency is not provided for by the will, and I cannot tell what the testator would have done if this state of possible circumstances had been present to his mind. It appears to me that he has not thought about providing for these issue at all, in the event of the death of either of his sons during the minority of *Hannah*. There is a careful direction for the bringing up of all his children, and he might have foreseen, if he had cast about for all events, that some of those children might well marry and have children during *Hannah's* minority, and might die, and those grandchildren would want provision as well as his children themselves. There is no provision for any of those children during *Hannah's* minority, but only a provision for the maintenance of the parents. The particular gift over runs thus: "If any of my sons shall depart this life during the minority of my

(1) 1 Ves. Sen. 208. (2) 6 Ves. 499.

said daughter *Hannah* as aforesaid." I agree with Mr. *Giffard* that this standing alone might be said to have brought the case within *Spalding* v. *Spalding* (1), and other authorities, if there had been no other limitation or alternative. But the testator goes on to say, "or in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share shall be divisible." The period of division was *Hannah's* attaining twenty-one, and therefore he has said, in words which really do not admit of two constructions, "If either of my sons die during the minority of *Hannah*, or die without having issue, either (1) before or (2) after *Hannah* attains twenty-one." He has thus put two classes of events together. He has said, "I point to a dying in the one case *simpliciter* during a given epoch, before the period of distribution. I point to a dying without having issue in the other case generally." I should say that the words "without having issue" must, in my opinion, be construed in all respects as the same as "without issue." "If that happens either before or after *Hannah* attains twenty-one, then the property is to go over." It is true that, in one sense, as Mr. *Giffard* observed, the second alternative might be included in the first, yet still it is emphatic; and although it is strange to suppose that he did mean it in this sense, yet if he did, he certainly could hardly have expressed himself more clearly.

The other point relates to the expression of what is to happen on a share going over to "*the next survivor according to the seniority of age and priority of birth.*"

I think there would have been considerable difficulty in this will if the testator had not, in the first gift, arranged his children according to their order of birth. I think, when you say "next," it is by no means clear whether you mean next above or below; but when you speak of the next in order of things, you must have regard to the person exhibiting the order to you; if he arranges the objects in a given way, placing this one first, that one second, and so on, and then says "the next," the word "next" must mean the next according to his own demonstration and arrangement, that is to say, in this case the next in a descending order of age.

I think you must go with him, and descend from the one who

(1) Cro. Car. 185.

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dies to the one who stands next, according as he has placed them in his own arrangement. I think if the testator had not placed the sons in that way, according to their ages, it might have given rise to great uncertainty.

The declarations will be to the effect that, according to the true construction of the will, upon the death of *John* during the minority of *Hannah*, the estate devised to him in tail male was (notwithstanding his leaving issue male) divested, and passed to his next eldest surviving brother *Benjamin* in tail male (subject to a moiety of the annuity), and then upon the death of *Joe*, without issue, during the minority of *Hannah*, the estate devised to him in tail male was divested and passed to his next eldest surviving brother *George*, in tail male. The costs of all parties to be taxed as between solicitor and client, and be paid out of the estate.

Solicitors for the Plaintiff: Messrs. *Edwards, Layton, & Jaques*, agents for Mr. *A. H. Owen, Huddersfield.*

Solicitors for the Defendants: Messrs. *Shum & Crossman*; Messrs. *Edwards, Layton, & Jaques*, agents for Messrs. *Hesp, Fenton, & Owen, Huddersfield.*

V.-C. W. 1867 Jan. 11, 12, 14.

DAW *v.* ELEY.

Patent—15 & 16 *Vict. c.* 83, *s.* 25—*Determination of Foreign Patent—Prior Invention and subsequent Infringement not correlative.*

A patent was taken out in *France*, in 1858, by *A.*, who, in 1861, obtained letters patent for his invention in *England*. The English patent was assigned by *A.* to *C.*, who, in January, 1865, obtained, in a suit against *E.* for infringement, a decree by which the validity of the patent was declared, and an injunction was granted to restrain infringement. In February, 1866, a judgment of *dechéance* was pronounced by the French tribunal at *Paris*, declaring the French patent, and all rights under it, determined and void from February, 1864, on the ground of non-payment by *A.* from that time of the annual duties imposed upon patentees by the French law.

Upon a motion by *C.*, in January, 1867, to commit *E.* for breach of the injunction awarded by the decree of January, 1866:—

Held (I.), that *A.*'s English patent being identical with his French patent, it was determined in this country (by force of 15 & 16 Vict. c. 83, s. 25) from February, 1866, the date of the annulment of the French patent by declaration of the French Court, but not sooner; and that although such

declaration was in terms retrospective, yet, until actually obtained, the English patent remained in force, and there was no error calling for amendment by bill of review in the decree of this Court, by which its validity was declared in January, 1866:

Semble, that if the English patent had comprised additional matter not protected by the French patent, the determination of the French patent would only have affected that part of the English patent which was identical, leaving untouched such additional matter:

Held, also, that the injunction granted in January, 1866, being only co-existent with the patent, expired when the patent was determined, and that it was open to *E.*, in answer to the motion to commit, to shew that there was no longer any order of the Court in existence which he could be said to have infringed:

Held, also, that *C.*, as assignee of the English patent, was bound by the decision of the French tribunal.

(II.) Upon the construction of the patent:—

Held, that the antecedent existence of an invention, not shewn to have been brought to any successful result, and which was so far similar, that if subsequent in date to the patent it would have been held a colourable and clumsy imitation for the purpose of effecting the same result, did not invalidate the patent by anticipation:

Held, also, that although the patent included matters some of which were new and some old, it might be upheld by limiting the claim (as in *Seed* v. *Higgins* (1)) to the particular combination in the particular manner described in the specification.

THIS was a motion on behalf of the Plaintiff to commit the Defendants, Messrs. *Eley*, for a breach of the injunction granted by the decree of this Court, pronounced in November, 1865, and drawn up on the 27th of January, 1866, by which the Defendants were restrained from manufacturing or selling cartridges for breech-loading fire-arms, in infringement of *Schneider's* patent for improvements in central fire breech-loading cartridges, now vested in the Plaintiff by assignment.

The circumstances leading up to the present litigation may be thus stated:—

Until within the last few years the cartridge generally used for breech-loaders has been the *Lefaucheux*, or pin cartridge, which is ignited by a pin inserted into the side at an angle with the axis of the cartridge. About 1853 a Frenchman named *Bellford* obtained a patent for improvements in fire-arms and cartridges, but that invention, which was purchased by Mr. *Lancaster*, of *New Bond Street*,

(1) 8 H. L. C. 550. 6 Jur. N.S. 1264.

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did not, as far as the cartridges were concerned, appear to have been very successful, and differed in many particulars from the system described in *Schneider's* specification. In 1855 a central-fire cartridge was invented by M. *Pottet*, a Frenchman, but not patented in this country. This cartridge was discharged by a percussion cap introduced into a recess formed at the rear end of the cartridge, so that the percussion powder came in contact with a thin flat anvil or gudgeon placed in a metal chamber with a bell-mouthed aperture, which was closed by the percussion cap. When the percussion cap was struck down upon the anvil the detonating powder exploded, the flame rushed down the side of the anvil, and passed through an orifice at the upper end of the chamber, so as to ignite the gunpowder contained in the body of the cartridge. Mr. *Lancaster* purchased this invention, but did not patent it in this country, and the thinness of the anvil seems to have rendered it liable in any but *Pottet's* own guns to be displaced, and thus miss fire. About 1856 Mr. *Lancaster* employed the Defendants, Messrs. *Eley*, to manufacture some cartridges for him upon *Pottet's* principle, but suggested a modification of the anvil, which was accordingly made first square, and then triangular in shape, and with plane sides, so as to be less subject to displacement from its position in the inner chamber, while ample space was still left for the passage of the flame down the sides. Cartridges made with this triangular-shaped anvil were tried by Mr. *Lancaster* at his shooting-grounds in 1858, but their use does not appear to have been continued, as they were found defective in some respects.

In February, 1858, a patent was taken out in *France* by *François Eugene Schneider* for central-fire cartridges, and certificates of addition were subsequently obtained by him. In September, 1861, *Schneider* obtained a patent in *England* for his invention, which was in some respects similar to that of *Pottet*, but constructed with a cylindrical grooved-sided anvil, and with the flange or edges of the internal chamber placed beneath the metal head of the cartridge. The material parts of the English specification, which contained numerous references to the drawings and plans annexed, were as follows:—

"I make my improved cartridge with the percussion cap placed in centre of same, and about level with the end of the cartridge. This percussion cap itself I manufacture in two ways,—the first

with a spreading top or flange, and the second with an internal metallic gudgeon or anvil, which, on the cap being struck, offers the required amount of resistance for effectually igniting the same. For the second description of cap I manufacture a cartridge with a metallic ball for the anvil to rest against during the explosion."

The specification, after describing the machinery used for manufacturing these cartridges, proceeded to refer to and describe the annexed drawings, and contained the following passages:—

"The anvil used in these cartridges is, by preference, of a cylindrical form, and has longitudinal grooves in it, by which the fire of the percussion powder may readily pass from the percussion cap to and through the opening at the fore end of the chamber or recess in which the anvil and percussion caps are received. (Figure 3* shews the form of the anvil). It is not essential that the anvil should be cylindrical, or that it should have four longitudinal cuts or grooves formed in it, as shewn at fig. 3*, as it may be formed with a greater or less number of cuts or grooves, and be formed of other transverse sections, so long as it is made to fill as nearly as may be the cap, and has cuts or grooves formed in it. In manufacturing the above-mentioned cartridges I make use of four different machines. I would have it understood that what I claim is— 1. The manufacture of cartridges described with reference to figs. 1, 2, and 1*; and I also claim the manufacture of cartridges described with reference to figs. 3, 4, and 3*."

The Plaintiff had purchased this patent from *Schneider*, and was registered as the equitable assignee. In the International Exhibition of 1862 the Plaintiff exhibited cartridges manufactured according to *Schneider's* patent, and also a breech-loading gun specially constructed for the use of these cartridges. Mr. *Lancaster* considered that both cartridges and gun were an infringement of *Bellford's* patent, and legal proceedings were taken by Mr. *Lancaster* against Mr. *Daw* in respect of *Bellford's* patent; but Mr. *Lancaster* was compelled to abandon the proceedings on payment of Mr. *Daw's* costs, as it was discovered that *Bellford's* French specification had been deposited in the Bodleian Library within a few days before it was patented in this country by *Lancaster*. In 1864 Messrs. *Eley* again took up *Pottet's* cartridge, adopting a triangular

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anvil, but scooping out the sides instead of leaving them plane, as in 1857, thus affording a larger space for the passage of the flame, and also reverting to the external position of the flanges of the inner chamber. In February, 1865, they sent the Plaintiff a circular announcing that they were supplying central-fire breech-loading cartridges for guns manufactured on the *Lancaster* and other systems. After some correspondence, in the course of which Messrs. *Eley* asserted that they had made and sold central-fire cartridges for many years prior to *Schneider's* patent, and that it was their intention to continue doing so, the Plaintiff had filed his bill to establish the validity of his patent, and to restrain the alleged infringement.

The case came on for hearing upon motion for decree in November, 1865. The defence then raised was, in effect, that *Schneider's* patent was bad from having been anticipated by *Pottet's* invention, and also by prior user in the experiments made by Messrs. *Eley*, under Mr. *Lancaster's* direction, in 1857, and that the patent was also bad upon the terms of the specification. The Defendants also insisted that in any case they had not been guilty of wilful infringement, as they had adopted *Pottet's* invention, and improved upon it from time to time, without the smallest intention of pirating any existing patent.

The case lasted some days, and on the 24th of November, 1865, His Honour gave judgment in favour of the Plaintiff, holding that the defences of anticipation and prior user had not been established upon the evidence, and that *Pottet's* invention, which, if made after the date of *Schneider's* patent, might have been held to be a clumsy imitation for the purpose of effecting the same result, did not, from being prior in date to *Schneider's* invention, have the effect of invalidating that patent. His Honour also held that *Schneider's* specification was not invalidated from the claim being too large in its terms, and that the case of infringement was fully made out (1).

(1) His Honour's judgment on that occasion contained the following passages :—

"If the first part of the invention was to be regarded as the claim, it would undoubtedly include *Pottet's* invention. He says this: 'I make my improved cartridges with the percussion cap placed in the centre of same, and about level with the end of the cartridge. This percussion cap itself I manufacture in two ways—first, with a spreading top or flange; and the second'—the invention in

Although that judgment was delivered in November, the decree was not actually drawn up until the 27th of January, 1866.

By this decree the validity of the patent of the 4th of September, 1861, was declared, and the Court "being of opinion that the

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question—'with an internal metallic gudgeon or anvil, which, on the cap being struck, offers the required amount of resistance for effectually igniting the same.' As far as these words go, they would include *Pottet's* invention. He has an internal metallic gudgeon or anvil (whatever the meaning of the word 'gudgeon' may be), and it offers a resistance for igniting the same. That is *Pottet's*, which, although it sometimes fails, as often succeeds."

His Honour, after referring to subsequent parts of the specification, proceeded thus:—

"What he claims is not a simple invention of an anvil, but the manufacture of cartridges as described with reference to certain figures, limiting his claim to the manufacture of cartridges described with these figures, subject to such words as enlarge his claim in the passage first read. What he enlarges it to is this: 'I claim the thing there represented, and the best mode of doing it I have shewn you in these figures. It may be made without being cylindrical; it may be made square, triangular, or oblong; but it must be made as nearly as possible to fill the cap with cuts or grooves formed in it.' This is the difficult part, and occasioned me to deliberate much. The point is, whether, in truth, this would include *Pottet's* invention or not. Now, as regards actually including it, I have no doubt it would not; because it is quite clear that *Pottet's* anvil, which is cut out of a simple plate, and nothing more, has a flat side, and no grooves. Mr. *Lancaster* thinks you should have the widest space you can possibly have. That is not the thing which the Plaintiff says is important. It must, whatever be the section, be made to fill, as nearly as possible, the cap, and must have grooves in it. It could not be said, and was not said, that *Pottet's* invention fulfilled these requirements. The argument, however, was—and it was one deserving attention—that if *Pottet's* invention were now produced for the first time, and it had never been heard of before, would it not be an infringement of *Schneider's* patent, not as being the thing described in the patent, but as being a colourable infringement of it? That argument opens up a new question, viz., how far the existence at an anterior period of a clumsy (I do not use the term invidiously) mode of effecting some object, which mode, if put forward after a patent had been taken out, would be, though bad and clumsy, a colourable imitation—how far, if made before the patent, it would invalidate it.

"It does not appear to me that the two points are exactly correlative. If *Pottet's* invention had been subsequent to the patent, the Court might have said, 'This is a clumsy attempt to invade the patent, but you do not fill the whole cap; you have got on as well as you could without so doing.' It would be quite another thing, however, to say, 'Because a clumsy imitation of the patent was made before that which is claimed by the patentee as included in the patent, therefore the patent is void.' I should have had less difficulty on the dry point of law, if it had not been for the circumstance

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patent had been infringed by the Defendants," decreed an "injunction to restrain the Defendants from manufacturing, selling, or disposing of any cartridges similar to the cartridges so patented by *F. E. Schneider*, or which should differ therefrom colourably only, or from otherwise infringing the said letters patent, and ordered an account, and payment of costs by the Defendants."

About this date proceedings were instituted before the French tribunals by Messrs. *Eley*, for the purpose of invalidating, on the ground of the non-payment of the annual duties, the French patent obtained by *François Eugene Schneider* in February, 1858. According to Article 32 of the law of the 5th of July, 1844, still in force in *France*, patentees who omit to pay the annuity or annual duty to Government during the continuance of their patents forfeit all their rights under the patent and the certificates of addition founded thereon; but an order of the proper Court is necessary for the purpose of declaring the patent void. It appeared that *François Eugene Schneider*, who resided at *Strasburg*, was in partnership with his brother, *Georges Schneider*, who resided at *Paris*, and there represented his brother's interests. The last of the annual payments in respect of the French patent made by *Georges Schneider* was in February, 1863, and the default was explained in an affidavit filed by him upon the present motion to have arisen from a decision of the French Tribunals in an action brought against

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that both *Schneider* and the Plaintiff knew of the existence of this article, which may suggest a doubt how far it would be quite good faith in them to say, that, being of a wholly different description from theirs, they disclaimed it. But the Courts have held repeatedly that if you claim a specific thing, which you limit by the very form of your claim to something specifically described, as in the case of *Seed* v. *Higgins*, including, as I do, everything, of whatever shape, made to fill up the cap having cuts or grooves formed in it, the claim is read as a limited claim by the Courts in this way, that they cannot extend it beyond the words to which the patentee has limited it, and that, being so limited, it is not necessary to say (having reference to the sewing machines' case, *Foxwell* v. *Bostock*), what parts are new, and what are old. He claims the cartridge, be it new or be it old, when only it is manufactured with reference to those figures, as explained by his saying that it may be of a different figure, so long as it fills the cap.

"On these grounds, I cannot hold this invention to have been made anterior to the description given by the patent, and I do not hold the patent to be invalidated by including too much, or by including *Pottet's* invention."

him by *Pottet*, in 1864, for infringement of his (*Pottet's*) invention. The French Court decided that both *Pottet's* and *Schneider's* processes had been anticipated by a prior invention (that of *Bellford*), and that, as neither of the inventions were new, *Schneider* was entitled to go on making and selling his cartridges. *Schneider* stated that in consequence of this decision he did not think it worth while to renew the annual payment upon the patent, which fell due on the 5th of February, 1864, whereupon the patent became void in law.

On the 22nd of February, 1866, judgment was pronounced by the First Chamber of the Civil Tribunal of First Instance of the Department of the *Seine*, sitting at the *Palais de Justice, Paris*, by which the Defendants MM. *F. E. Schneider* and *Georges Schneider* were "declared legally deprived of all rights and advantages to which they may have been entitled, either together or separately, with reference to the patent granted to *F. E. Schneider* by the French Government, dated the 5th of February, 1858, and all certificates of addition, from the 6th of February, 1864."

On the 27th of June, 1866, the Third Chamber of the Civil Tribunal dismissed an appeal which had been presented on behalf of *F. E. Schneider*, and ordered the judgment of the First Chamber to be carried into effect.

In March, 1866, the Defendants having made certain experiments, in which they had placed two distinct flat anvils cut out of a flat piece of metal, on the *Pottet* principle, in the percussion cap, and thereby obtained what they considered a superior cartridge, took out a patent for this double anvil cartridge. According to the provisional specification which was filed on the 24th of March, and corresponded with the complete specification filed on the 21st of September, 1866, an anvil was "placed in the percussion cap of a central fire breech-loading cartridge in two or more parts, by which means the flame from the percussion powder passes between the several parts of the anvil as well as round the sides before escaping through the hole in the centre of the chamber. This arrangement of the anvil and cap also has the effect of expanding the copper cap tightly within the chamber, and preventing an escape of gas at the breech end of the cartridge. It is also more certain of ignition, and cheaper to manufacture, than an anvil made of one piece

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of metal only." The parts of the anvil were stated to be "by preference formed by punching or cutting them out of a sheet or strip of metal; and I prefer to place the rounded or convex sides back to back within the cap, as shewn, whereby spaces are formed for the passage of the flame when the explosion takes place." The claim was finally stated to be "the application and employment of an anvil formed of two or more pieces of metal placed in the percussion cap of a central-fire breech-loading cartridge, as therein described."

Messrs. *Eley* had lodged an appeal against His Honour's decree, but, as they stated, considering that the use of the single or double *Pottet* anvil was fairly open to them, they obtained an order on the 7th of June dismissing their petition of appeal on payment of the Plaintiff's costs. The Plaintiff, considering that the Defendants were colourably evading his patent, and thereby infringing the injunction of January, 1866, by manufacturing cartridges with the double *Pottet* anvil, under their patent of September, 1866, now moved to commit the Defendants for breach of the injunction of January, 1866.

The Defendants, by their affidavits upon the present motion, denied having in any way infringed *Schneider's* patent, and also put in evidence the proceedings before the French tribunals, and an official copy of the judgment of *dechéance* in February, 1866, and of the rejection of the appeal against that judgment by the Superior Court in June, 1866.

Mr. *Willcock*, Q.C., Mr. *H. T. Cole*, Q.C., Mr. *Boyle*, and Mr. *Theodore Aston*, in support of the motion, contended (1), that the Defendants had, since the date of the injunction, colourably infringed the Plaintiff's patent by producing that which was the same in reality with *Schneider's* invention, though different in appearance: (2), that there had been no acquiescence on the part of the Plaintiff so as to preclude him from now moving, and that in any case acquiescence was wholly immaterial after a decree of the Court, and was only important upon an application for an interlocutory injunction: (3), that it was not open to the Defendants, upon a motion to commit them for breach of the injunction, to impeach, by evidence of what had taken place

in *France* or otherwise, the validity of the patent which had been established by the decree, of this Court; and that such a question could only properly be raised by a bill of review, for the purpose of avoiding the decree on the ground of error, after obtaining leave of the Court.

Mr. *Daniel*, Q.C., Mr. *Grove*, Q.C., and Mr. *Langley*, for the Defendants:—

(1). There has been no infringement of Plaintiff's patent, or breach of the injunction. In order to establish a case of infringement Plaintiff must be able to shew that the use of every reasonable adaptation from *Pottet* was excluded. Upon the trial in November, 1865, the process then used by the Defendants was decided to be an infringement of *Schneider's* patent. The process now used by the Defendants was based wholly upon, and was an adaptation of, *Pottet's* process, and would amount to an infringement if such process were protected by a patent in this country. But in the course of your Honour's judgment it was expressly decided that *Schneider's* process was not identical with that of *Pottet*, so as to be invalidated by the prior publication of that process. How then can the Defendant's present process, admittedly based upon that of *Pottet*, and differing from it only in the employment of two anvils in place of one, be said to infringe *Schneider's* patent. *Pottet's* invention, the main features of which are the use of an anvil in a chamber with an aperture communicating with the charge, is material fairly before the public, by the use of which an ingenious adapter would have arrived at the result obtained by the Defendants without trenching in any way upon the limits of *Schneider*. If the Plaintiff claimed every transverse section whatsoever, then his patent would be bad from having been anticipated by *Pottet*. But if he limited his claim to the anvil described by reference to the figures contained in the specification, and thus sustained his patent on the principle of *Seed* v. *Higgins* (1), then the adoption of any anvil not within that particular description so limited would be no infringement of the patent: *Barber* v. *Grace* (2). The anvil of the Defendants

(1) 8 H. L. C. 550. (2) 1 Ex. 339.

6 Jur. N.S. 1264

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did not "as nearly as possible fill the cap," and was punched out of a sheet of metal, and not formed, like that of *Schneider*, of a cylindrical piece of wire grooved by circular saws. The Plaintiff, however, insists that there had been, if not a direct, a colourable imitation of his process, and, at any rate, that there had been a fraudulent intention to evade his patent. The Defendants deny any such fraudulent intention; but, after all, intention in such a case is immaterial, the test being what they have done, and not what they intended: *Stead* v. *Anderson* (1).

But even if the Court should be of opinion that the process now used by the Defendants amounted to an infringement of *Schneider's* patent, the English patent, and all proceedings for enforcing it, by the effect of 15 & 16 Vict. c. 83, s. 25 (2), were at an end as soon as the French patent was determined by the sentence of annulment passed by the French Tribunals; and the injunction being only co-extensive with the patent, there is no order in existence which the Defendants can be said to have infringed.

The VICE-CHANCELLOR:—What are the authorities upon sect. 25?

Mr. *Daniel*:—The following cases have been decided upon sect. 25, but they were all applications for a prolongation of a patent, and did not touch the point here raised, which, looking

(1) 4 C. B. 806.

(2) Sect. 25. "Where, upon any application made after the passing of this Act, letters-patent are granted in the *United Kingdom* for or in respect of any invention first invented in any foreign country, or by the subject of any foreign power or state, and a patent, or like privilege, for the monopoly or exclusive use or exercise of such invention in any foreign country, is there obtained before the grant of such letters-patent in the *United Kingdom*, all rights and privileges under such letters-patent shall (notwithstanding any term in such letters-patent limited) cease and be void immediately upon the expiration or other determination of the term during which the patent, or like privilege, obtained in such foreign country, shall continue in force, or where more than one such patent, or like privilege, is obtained abroad, immediately upon the expiration or determination of the term which shall first expire, or be determined, of such several patents, or like privileges: Provided always, that no letters patent for or in respect of any invention for which any such patent, or like privilege, as aforesaid, shall have been obtained in any foreign country, and which shall be granted in the said *United Kingdom*, after the expiration of the term for which such patent or privilege was granted, or was in force, shall be of any validity."

at the very precise words of the statute, is too clear to require any authority: *In re Aube's Patent* (1); *In re Newton's Patent* (2); *In re Bett's Patent* (3); *In re Hill's Patent* (4).

The VICE-CHANCELLOR:—It is an exceedingly inconvenient mode of raising this sort of question, but I cannot entertain any doubt that it is open to the Defendants, if they can do so, to shew that after the injunction was granted the patent had been determined by virtue of the proceedings in the French Courts.

Some discussion then took place as to whether the case should stand over to enable the Plaintiff to meet the defence raised under sect. 25 of 15 & 16 Vict. c. 83, and especially for the purpose of shewing that *Schneider's* French and English patents were not identical, but the result was that the argument proceeded.

In addition to the arguments already urged on behalf of the Defendants, it was contended that *Schneider's* French patent of 1858 was identical with the English patent of 1861, and that a bill of review was unnecessary.

Mr. *Willcock*, in reply:—

Schneider's French patent of February, 1858, and his English patent of September, 1861, were not identical, so that the judgment of the French Tribunal does not affect the English patent, or bring the case within sect. 25 of 15 & 16 Vict. c. 83. But even assuming the identity of the two patents, the French patent is shewn by the affidavit of *G. Schneider*, the Defendant's own witness, to have been judicially declared, in former proceedings before the French Court, bad, from having been anticipated by *Bellford's* process, and void *ab initio*.

Now, in order to bring sect. 25 into operation, and being a clause of forfeiture it must be construed strictly, and not extended so as to deprive an English patentee of his rights, it is necessary that a monopoly should have been created and existed in a foreign country; the object of the section clearly being that subjects of this country should not be fettered at a time when subjects of a

(1) 9 Moo. P. C. 43.
(2) 15 Ibid. 176. *9 Jur. N.S. 109*
(3) 1 Moo. P. C. (N. S.) 49. *9 Jur. N.S. 137*
(4) Ibid. 253. *9 Jur. N.S. 1209*

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foreign state were no longer under any restriction as to the manufacture of the particular article. But *Schneider's* French patent having been declared void *ab initio* created no monopoly, and never conferred any rights on the inventor in *France* capable of being rescinded or forfeited. It cannot be said that there ever existed in *France* any "term" subject to "expiration or other determination;" and therefore sect. 25, the operation of which was limited to cases where a term has been created, does not apply, and the English patent remains in force. Even if sect. 25 applied, the Plaintiff, as equitable assignee of the English patent, would not be affected by the proceedings as to the French patent before the French Tribunals, especially as he was no party to those proceedings, and was not represented in them. But in any case the patent, by the judgments of the French Tribunals of February and June, 1866, was declared void from the 4th of February, 1864, long before the filing of this bill, and consequently there would be a decree of this Court declaring the validity of the English patent, at a time when, by the judgment of the French Court annulling the French patent, it had become void. It might be open to the Defendants to raise this question upon a bill of review, but until the decree of January, 1866, is set aside by some formal proceeding, it cannot be avoided by evidence introduced in answer to a motion to commit for breach of the injunction thereby awarded.

SIR W. PAGE WOOD, V.C.:—

The injunction, for the breach of which it is sought by the present motion to commit the Defendants, is not exactly in the proper form, and should undoubtedly, according to the ordinary and common form, have restrained the Defendants from manufacturing that which is protected by the patent of the Plaintiff during the continuance of the patent, so long as it should be in force. The decree, however, does not make the mistake of being drawn in a form which would amount to a perpetual injunction, and I think that that which ought to have been distinctly expressed may be reasonably derived from the form of the Order, viz., that the injunction lasts so long as the patent lasts, and no longer. That being so, the first question is, whether in truth this patent is, or is not, now in existence, and if it be not in existence now, whether it

was in existence at the date of the decree, or became subsequently determined.

If the patent had ceased to be of any validity at the date of the decree, then, I apprehend, the only mode of getting rid of the decree would be by bill of review shewing that it was erroneous in declaring the patent to be valid and subsisting; whereas, if the patent be valid and subsisting at the date of the decree, but has become void by matters which have since occurred, then the decree declaring the patent to be valid is perfectly correct, and will not require any amendment. The order founded on it, which directs that the patent, as long as it remains in force, shall not be infringed, will also be correct. It will be open, however, for the Defendant, when he is charged with having committed a breach of the order, to shew that he has complied with it so long as it was in force, but that the order carried on its face the period of its duration, and that, as that period has expired, there is no order which he could be guilty of infringing. As I have already observed, it is a very inconvenient way of raising questions of this description —of great importance, and of considerable difficulty in point of evidence—as to whether or not a foreign patent may have determined. But it is impossible for me to say that it is not open to a person who is charged with having committed a breach of the injunction to shew that the order itself is determined. Assuming that the French patent is the same as the English patent, I think, on the whole, that the evidence shews that the decree made was good, and that if the patent be determined at all it has been determined since the decree was made by force of proceedings which have taken place in *France* since the making of that decree. It is curious enough how near the dates run. The decree in *England* is dated the 27th of January, 1866, and the judgment of the French Court bears date the 22nd of February, 1866. That judgment declares that from the 4th of February, 1864 (subsequent to the granting of the English letters-patent), the French patent was brought to its determination, to use the word contain in sect. 25 of the *Patent Law Amendment Act*, 1852.

Now, the evidence before me as to the French law shews that a patent is not determined in *France* for omission to pay the annual duties, without some proceeding by the proper Court, by which it

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is declared to be determined; and that although the French Court may declare that the patent lost its validity from some antecedent period (in the present case from the 4th of February, 1864), yet a judicial declaration to that effect is necessary; in other words, no person could have contravened the right of the patentee until there had been a declaration of its *dechéance* or determination of the right; and until that declaration was obtained the English Court would, notwithstanding the 25th section of the 15 & 16 Vict. c. 83, be justified in declaring in January, 1866 (a month before the judgment of the French Tribunal), that the patent was in force in this country, there being nothing which had taken place in *France* up to that time which had determined the French patent. It therefore becomes necessary to consider—first, the effect of the provisions of the *Patent Law Amendment Act* (15 & 16 Vict. c. 83, s. 25); and, secondly, whether the French patent of 1858 was identical with the English one of 1861. Now, in looking at sect. 25, one sees at once that the object was to prevent the subjects of this kingdom from being fettered in their right to compete with each other in the production and manufacture of different articles, when it was open to foreigners to enter into such competition without being fettered by any exclusive rights claimed by an inventor and patentee, or by the additional price which must be imposed upon the article in consequence of the patent right. The object, I say, is to prevent the English manufacturer from being fettered while the foreigner remains free. The provision was, singularly enough, not pursued to its proper logical consequence in the Act, which only deals with the case in which a foreign patent has been granted and determined; whereas if no foreign patent has ever been granted any number of foreigners may be manufacturing the article abroad, while English manufacturers might be exposed, by the existence of a patent in this country, to the very difficulty from which this section professed to relieve them. It does undoubtedly appear very harsh to prevent the English manufacturer from having the benefit of manufacturing that which all the rest of the world can manufacture at their pleasure, and yet to say that if it is protected for a certain limited time abroad, then, and then only, when that protection has ceased shall the English manufacturer become free. However, that is the

statute. It has been very ingeniously contended by Mr. *Willcock*, in reply, that a void foreign patent is to be treated as no patent at all, and that as this patent is stated in *George Schneider's* affidavit to have been declared by the French Courts, in 1864, invalid for want of novelty, the case is brought within that state of circumstances which is not struck at by the English statute, viz., the case in which everyone is entitled to manufacture the article abroad, and, consequently, that sect. 25 does not apply, the invention, so far as a patent was concerned, being new in this country. But even if such foreign patent has been declared void *ab initio*, still it would have been in force until declared void, so as to come within the purview of sect. 25, which speaks of the "expiration or other determination of the term during which," &c; and it was evidently not intended by the Legislature that the Courts should enter into nice questions as to patents being void *ab initio*, or from some subsequent period only. It does not seem to me that in any proper sense the case can be said not to be within the purview of the statute, because, by some reason of the French law, the patent might be declared void *ab initio*. But, at all events, no such question arises in this case, as the French patent of 1858 has been declared void, not *ab initio*, but from February, 1864, when the annuity ceased to be paid, and the original validity of the patent was assumed by that judgment. With respect to those other proceedings mentioned by *G. Schneider* in his affidavit, in which, being Defendant, he and *Pottet*, who was Plaintiff, were both told that their patents were equally void from having been anticipated by an anterior patent, those proceedings are not in evidence before me; but what I have is the judgment of February, 1866, which declares that from a given time, and a given time only, the patent is void. Therefore, it comes undoubtedly within the purview of sect. 25, as "the expiration or other determination of the term." The term was granted for fifteen years. *Schneider* paid for a certain number of years, and then ceased to pay; from that moment, and not sooner, the French Court has declared the French patent determined. It cannot either be maintained that the Plaintiff, Mr. *Daw*, is not bound by the decision of the French Court. I apprehend that, as assignee of the patent in this country, he is entirely bound by the proceedings against the original patentee, as it is surely the busi-

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ness of everyone who takes an assignment of a foreign patent—having sect. 25 before him—to see that the foreign patent is kept up in its full validity. Nor has it been suggested for a moment that the fact is not true, or that the case was not brought properly before the French Courts. The French patent of *Schneider*, therefore, and all rights under it, are gone, and if it is identical with the English patent, it follows, as a necessary result, that the English patent will be gone also. It comes, then, simply to the consideration of the two patents.

It may be that the Plaintiff's patent is perfectly good for all the other objects comprised in the letters-patent, though it may fail as to one particular part which has been protected by the foreign patent. Because certain parts of the English patent are identical with the French patent, it does not follow, as a necessary result under sect. 25, that when the French patent is determined the rest of the English patent, which is not identical, is void also. The effect of that section is to strike out of the English patent that which, up to a certain time, the foreign patent has covered, but ceases any longer to cover. Upon the question of identity I can have no doubt. No difference can possibly be drawn between the two things, which in every single part, as it appears to me, are identical. That being so, it does appear to me that the injunction terminates here, from the moment that the French Court decides that the French patent has come to an end from default in payment of the annual fee which is necessary in order to keep it up. The patent is determined in *France*, and being identical with that granted to *Schneider* in this country, the term has come to an end here also. That being so, it really is of comparatively little importance for me to consider whether or not there has been an actual infringement by the Defendants. What *Schneider* has claimed must be reduced to a very limited extent as to this particular point of the anvil as applied to the cap. He was not entitled to claim an anvil placed in a chamber: *Pottet* had had that before him, though no doubt *Pottet's* anvil was found not to answer from the absence of sufficient support, a further degree of fastening being required. *Schneider* did not notice in his specification *Pottet's* anvil or chamber, or anything which had previously taken place, and if he was claiming all these things as a new invention he would

have been in the difficulty of claiming too much, and the patent would be void upon that ground. It appeared to me, however, that I was entitled to read this patent as the patent was read in *Seed* v. *Higgins* (1) (where there was an express disclaimer of anterior inventions), as limited to a claim for the manufacture of cartridges described with reference to certain figures; that the patentee tied himself down to that, and made no further or larger claim than the claim of the whole of these things put together.

I was of opinion, on the former occasion, that the Defendants had made a mere colourable difference from the thing protected by these general words, by making their anvil in a species of triangular section, which in its rounded sides did tend to fill the cap—adhered to it, and would give a very solid support to the cap when the blow was struck, which was the object of having this cylindrical drum adhering, as the French patent says, by a tight fit (*frottement dur*) to the cap, and as the English patent says, by filling as nearly as possible the cap. In one sense it did not fill it as nearly as possible, because if they had done that they would have come within the direct words of the patent. But they filled it as nearly as they possibly could for their purpose, viz., without exactly infringing this patent. It appeared to me, therefore, that the cap was filled by the Defendants in such a form as to give firmness and a strong adhesion to the anvil, by means of the friction which would subsist between the rounded surfaces of the cap itself, while the grooves opened in it would allow the fulminating powder to pass up through the top of the chamber, so as to reach the charge. Further than this, it was in evidence that the process of making these two anvils was almost identical. They were both cut off from round wire; in the one case in a trefoil form, in the other in a cylindrical form, and it seemed to me there was a distinct imitation of the Plaintiff's process.

Now what has been done since the date of the decree is undoubtedly a very different thing. As in *Seed* v. *Higgins* (1), where the Plaintiff was confined very narrowly to his exact specification, in consequence of the anterior invention of another, so here *Schneider*, in consequence of *Pottet's* previous discovery, must be confined to very narrow limits, viz., that of securing the anvil by

(1) 8 H. L. C. 550.

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the particular mode in which he has described it. In *Seed* v. *Higgins*, the application of centrifugal force, almost identically in the same way, except that it was applied below the point at which it had been applied by the Plaintiff, was held not to amount to an infringement of the Plaintiff's patent on the ground of the necessity of confining the Plaintiff most narrowly to the particular method as limited by the disclaimer. I do not agree that the Plaintiff was confined to cuts or grooves. It was to cuts or grooves combined with this form, which by its rounded surface coming in contact with the cap, and fitting as nearly as may be to the cap, gives the solidity of position which is required for the anvil.

The Defendants have now taken *Pottet's* anvil and doubled it, and in so doing they have not pursued the Plaintiff's course of action, but have deliberately rejected it. Having punched the two anvils out of a flat sheet of metal, they have put them together, and secured support by a slight adherence just at the angle of these anvils of *Pottet*, which they find sufficient for the purpose without, as the Plaintiff does, filling up the cap as nearly as possible. Considering how very narrowly the Plaintiff must be confined in consequence of what has been previously known and discovered, it does appear that there is a substantial difference between the support derived by doubling *Pottet's* anvil, and that which, by the light afforded by the French patent, is clearly pointed out as being *Schneider's* view, viz., to secure solidity, fixity, and firmness by an anvil not necessarily cylindrical, but so formed as to have adhesiveness against the sides of the cap, and to fill up the cap as nearly as possible. Looking at what the Defendants have now done, it appears to me that they have hit on a process by which they arrive at the same result, without bringing themselves within those narrow limits to which the Plaintiff must be confined. On the substance of the case, therefore, the Defendants can no longer be treated as persons colourably evading the Plaintiff's patent.

With respect to evasion, if you find that the Defendant has come as near as he dare to an invention which has preceded him, but in consequence of being obliged to omit something which is necessary in order to make the matter answer, and from this

omission cannot succeed in carrying the whole thing properly into effect, there is a strong reason for saying that it is simply an attempt at evasion and nothing else. The whole thing is inferior, because, having pirated as far as he dare, he dares not pirate any further, and therefore it remains a barren and sterile invention. What has been done here is, that by simply striking out the plan of doubling *Pottet's* anvil, really nothing more, the Defendants have arrived at the same result as the Plaintiff. Apart, therefore, from the question as to the expiration of the English patent by reason of the determination of the protection afforded by the French law; upon the special merits, infringement or no infringement, it is not a case in which I ought to commit, or make an order equivalent to committal, by making the Defendants pay the costs of this motion; but I must refuse the motion, with costs.

Solicitors: Messrs. *Blake & Snow;* Messrs. *Pritchard & Collette.*

PEEK *v.* MATTHEWS.

Injunction—Covenant against Building—Covenant between Purchasers inter se—Antecedent Breach of Covenant.

Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; and there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the Defendant became a purchaser, and executed the deed of covenant.

MOTION for decree.

The Plaintiff, *William Peek*, was the owner in fee, according to the custom of a manor, of an estate which had been laid out in building plots, of one of which the Defendant, *Edward Matthews*, was the purchaser.

Part of the contract with each purchaser was, that he should

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enter into the covenants contained in a deed dated the 24th of December, 1860, and made between the Plaintiff of the first part, and the several persons who were, or should be, described in the schedule of purchasers thereunder written, and should become parties to and execute those presents (called covenanting parties), of the second part, whereby the covenanting parties for themselves respectively, and their respective heirs and assigns, covenanted to and with the Plaintiff, "and to and with all and every other the persons who should execute the indenture," respectively, and their respective heirs and assigns, that they would leave open and unbuilt upon such portions of the respective plots to be purchased by them respectively as were coloured blue on the plan thereto annexed; which land so to be left unbuilt upon should be inclosed by a dwarf wall, surmounted with stone coping and iron palisadoes.

The Defendant purchased on the 27th of August, 1863; the Plaintiff surrendered to him the same day, and the same day he executed the indenture.

The bill was filed on the 1st of May, 1866, alleging that the Defendant had commenced to build on that portion of his plot which was marked blue, and praying for an injunction to restrain such building.

Defendant's case was, that other prior purchasers on the same estate had already built upon the portions of their plots marked blue—one since proceedings had been threatened—and no steps had been taken by or on behalf of the Plaintiff to prevent them. In one instance an outhouse ten feet high had been erected on part of the plot coloured blue. The only erection the Defendant had built was a boundary wall, five feet seven inches and a half high.

In reply, the Plaintiff denied all knowledge of the alleged breaches, but admitted, by one of his witnesses, that in 1860, *Bladon*, a purchaser of one of the plots, inclosed the piece of land in front of a new house which he had erected on his plot, including the part coloured blue, with a brick wall. *Bladon* had sold to *Keeling*, the intending purchaser of another plot, who, having been let into possession of this second plot, had built a similar wall. In 1862, another purchaser, *Pidduck*, executed the deed, and he also inclosed that part of his plot which was coloured blue with a brick wall, and afterwards sold to *Daniel*.

Keeling and *Daniel* both said that these walls were temporary, and intended to remain only so long as the pieces of land were used for gardening purposes, and that as soon as they had erected dwelling-houses on the plots of land, it was their intention to remove the walls. The ten feet building, *Keeling* said, was only a gardening or tool-house.

Mr. *Amphlett*, Q.C., and Mr. *R. A. Douglas*, for the Plaintiff.

Mr. *J. W. Chitty*, for the Defendant, relied upon *Duke of Bedford* v. *Trustees of British Museum* (1), and *Roper* v. *Williams* (2). *Durell* v. *Pritchard* (3), and *Spencer's Case* (4), were also referred to.

Mr. *Amphlett*, in reply:—

Two particulars distinguish this case from the authorities cited: one, that this was not merely a covenant by the purchaser with the vendor, but also a covenant by each purchaser with all the rest; the other, that this Defendant executed the deed after, and therefore with full knowledge of, the breaches (if such they were) which had been committed in 1860 and 1862. Consequently, his must be considered a new covenant *ab integro*, and he could not be allowed to avail himself of what had taken place before his time to escape his obligations.

Jan. 25. SIR W. PAGE WOOD, V.C. (after stating the facts continued):—

It is quite clear that the case would have fallen within the authority of *Roper* v. *Williams*, but for one point, namely, that the Defendant executed the deed after the breach by the other covenanting parties had been committed. In *Roper* v. *Williams*, the Court, in considering whether it would grant specific performance of a covenant of this description, which is framed only to provide uniformity in mode of building, so that the enjoyment which springs from regularity in a series of dwellings may be pre-

(1) 2 My. & K. 552.
(2) T. & R. 18.
(3) Law Rep. 1 Ch. 244.
(4) 1 Sm. L. C. 36, 4th Ed.

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served, held that he who seeks to enforce a covenant of this kind must suffer no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement.

I do not think there is any substantial difference in this case, though Mr. *Amphlett* has pressed it upon me, arising from the circumstance that this covenant was also a covenant between all the purchasers *inter se*. In *Roper* v. *Williams* the vendor took a covenant from all his purchasers, and Lord *Eldon* said (1) that a vendor in such a case is stipulating not only for his own benefit, but for that of all the tenants in his neighbourhood. As a *quasi* trustee for them, therefore, he is bound to enforce the covenant as much against one as against the other. Therefore I do not think the distinction is a sound one. The principal point is this: here is a common scheme, and it is one thing to say that parties may pursue any remedy they may be entitled to at law, and another thing to say that this Court will grant specific performance of an arrangement which can only be carried out in part. A Court of equity will say, the vendor cannot enforce these rules when he has suffered the whole of his original design to be broken up.

A Plaintiff may say: "I want specific performance, because damages would not be an adequate remedy." But here the common arrangement has been put an end to, and the beauty which arises from uniformity of design destroyed. It is an answer to him to say, "You have allowed this breach to take place in several other places, and have suffered the advantages which you possessed to slip through your hands." The reasoning, both of Lord *Eldon* and Sir *Thomas Plumer*, in *Duke of Bedford* v. *Trustees of British Museum* (2), went upon this, that there was an old covenant between the Duke of *Bedford* and the trustees of the Museum, and the intention of both parties having originally been that the two mansions should be specifically kept up, as they were at first, that species of enjoyment was afterwards entirely broken through by the erection by the feoffor himself of a number of buildings in the neighbourhood. That, said Lord *Eldon* and Sir *T. Plumer*, is not a case in which the Court can be asked specifically to enforce a covenant,—

(1) T. & R. 22. (2) 2 My. & K. 552.

where the agreement cannot be fully carried out. The thing must either be enforced *in toto*, or not at all.

In this case the mischief complained of was done by persons who are no longer owners of the property; and it is further said, that these walls are only temporary erections, and that when the property is built upon they will be removed. But one wall has been standing for nearly seven years, and the other for nearly five; and although these gentlemen say: "We bought it as building land, and we intend to build upon it," nobody can say when they intend to begin building. I cannot, therefore, attribute much weight to this representation.

The Defendant certainly did execute the deed after these breaches had been committed in 1860 and 1862. But, I confess, after much consideration, I do not think that makes a substantial difference in the case. I think he has a right to say: "this common scheme of building has not been preserved;" and if the vendor is entitled to any remedy, it can only be the damages which he may obtain in an action at law. I cannot say that I think the Defendant has put himself into the position of a person who says, "I will waive all these breaches, and submit myself voluntarily to the terms of a new contract."

Nor can I listen to what the Plaintiff has alleged about his ignorance of the building in 1860 and 1862. The bill must be dismissed, with costs.

Solicitors for the Plaintiff: Messrs. *T. White & Sons*, agents for Messrs. *Ward, Son, & Cooper, Newcastle-under-Lyme.*

Solicitors for the Defendant: Messrs. *Rickards & Walker*, agents for Mr. *M. F. Blakiston, Hanley.*

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Jan. 23, 25, 28, 29; Feb. 8.

HALLOWS *v.* FERNIE.

Company—Directors—Bill by Shareholder on behalf—Misrepresentations in Prospectus after Registration—Fraud—Injunction to restrain Calls—Repayment of Deposit and Allotment Money—Indemnity.

Bill by shareholder, on behalf of himself and all others except the directors, against the original and present directors, and the company, alleging misrepresentation in a prospectus published by the original directors after registration, on the faith of which Plaintiff took shares, and fraudulent dealings by one of the original promoters with one of the Defendants, whereby such Defendant and his friends, on the occasion of the sale of property by them to the company, came on to the direction; and praying that the present directors and the company might be restrained from enforcing a call, that the original directors might be decreed to repay to the Plaintiff and the other original shareholders the amount of their deposit and allotment money with interest, and to indemnify him and them against all future calls, they offering to deal with the shares as the Court should direct; also to have the arrangements connected with the sale to the company set aside. The alleged misrepresentations were a statement in the prospectus that eleven persons named were directors, of whom it was alleged, first, that three were not at that time and never were, directors, and afterwards (by amendment) that none were ever properly constituted directors: and, secondly, a statement in the prospectus that the company would commence operations with six screw steamships of specified tonnage and rate of speed. The facts were, that all the three persons named were acting as directors when the Plaintiff applied for his shares, but one of them ceased to act before, and the other two shortly after, the allotment of shares to the Plaintiff. At the time when the prospectus was issued the company had no ships, but they had contracts for the supply of two ships. They then entered into the arrangements sought to be set aside by the second part of the bill. The directors were empowered by the articles to commence business, although the whole of the funds of the company should not have been subscribed:—

Held, that a subscriber for shares is not entitled to be relieved from his contract on the ground that after his application, and before allotment, a change has taken place in the direction which has not been communicated to him.

The subscribers to the memorandum of association of a company are by the *Companies Act*, 1862, competent to act as first directors; and, *Semble*, that acts done by them unanimously are not vitiated by the fact of no meeting being held to sanction them.

The meaning of the second statement in the prospectus having been held to be, that the company did not intend to start till they had the six ships, and that in the event of their obtaining sufficient subscriptions, there was in existence a conditional contract for the supply of six ships of the specified character:—

Held, that this was not such a misrepresentation as went to the essence

of the subscriber's contract, he having knowledge of the articles of association, and there being nothing to shew that ships of the specified character might not at any time be purchased in the market; and bill dismissed against the original directors, but without costs.

The Court having further found that the arrangements impeached by the second part of the bill were wholly free from fraud, the bill was dismissed against the subsequent directors, with costs.

Affd by L.C. 3 Ch. 467.

THIS suit was instituted by *James Hallows*, on behalf of himself and all other the original members of the *British and South American Steam Navigation Company, Limited* (other than the Defendants), against *William James Fernie, Edmund Thompson*, eight persons named *Colchester, Johnston, Ridley, Smith, Wakefield, Watson, Weguelin*, and *Zahn*, five persons named *De Laski, Pardo, Dobson, White* and *Hall, Thomas Chilton*, the above-named company, and the *British and American Steam Navigation Company, Limited.*

The eight Defendants classed together as above, were, in April, 1864, directors of the first-named company (which is hereafter distinguished as "the company"); and the class of five above-named Defendants came on to the direction in or about September of the same year.

The bill prayed that eleven of the Defendants, the then present directors of the company, might be restrained from enforcing a call against the Plaintiff and the other original shareholders (other than the Defendants); that the eight above-named Defendants, and *Thompson*, were jointly and severally liable to repay to the Plaintiff and the other original shareholders (other than the Defendants) the deposit and allotment money paid by the Plaintiff, and such other original shareholders, for shares taken by them in the company, with interest, and to indemnify them against the call already made, and all future calls, they being willing to assign or transfer such shares to the last-named Defendants, or otherwise as the Court should direct; and for an account and payment; that in the meantime the company, and the Defendants purporting to act as directors thereof, might be restrained from carrying on business: that, if necessary, the company might be wound up; for a declaration that certain arrangements below referred to with the second above-named company (hereafter

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distinguished as "Mr. *Fernie's* company") were fraudulent and void as against the Plaintiff and the other original shareholders; and for proper consequential directions; and for a declaration that the appointment of Messrs. *Fernie, Brothers, & Company*, as the general managers of the company at *Liverpool* was invalid, and that the Defendant *Fernie* might be restrained from acting as such manager.

The company was incorporated on the 24th of March, 1864, with the objects, as stated in the memorandum, of "building, purchasing, chartering, hiring, equipping, fitting out, sailing under the British or other flag or flags, managing, reselling, and letting out to hire, of ships or vessels, or other craft of every description, whether propelled by steam or not . . . . the carrying or conveying and transmitting of goods or merchandize and passengers by sea or land, the purchasing of any goods or merchandize as cargo or ballast . . . . the purchase of the business of any persons, partnerships, or companies, or amalgamation with any company of a similar nature . . . . The capital was to be £1,000,000, in 50,000 shares of £20 each. The articles provided, that (7) the directors should be at liberty to commence the business of the company as soon as they should think fit, notwithstanding the whole of the capital should not have been subscribed; that (73) until the holding of the first ordinary meeting the number of directors should be such (not less than seven, nor exceeding seventeen) as the directors for the time being should deem expedient, and that until such meeting the directors for the time being should have power to nominate and appoint such persons duly qualified as they should from time to time think fit, to be directors; that (74) the first directors should be appointed by the persons signing the memorandum, or by a majority of them; that (75) the board in any current year might appoint for the residue of the year, and until the next ordinary general meeting, any one or more persons to be directors; that (82) any director might resign by giving three months' notice. The general powers of the directors extended (107) to the effecting with Government and other authorities and persons in the *United Kingdom* and elsewhere, of all such contracts or arrangements as they might think necessary or advantageous; and to the entering into contracts for the company, and contracting on its behalf of all such debts and liabilities as

they might think necessary in managing the affairs, and transacting the business thereof. By Article 118 the Defendant *Edmund Thompson* was declared to be the first ships' husband of the company.

The memorandum was signed by the Defendants *Johnston*, *Wakefield*, *Thompson*, and *Ridley*, and by three other persons, *McKean*, *Beverley*, and *Blythe*, who never became shareholders.

The relief sought was founded on two separate grounds. The Plaintiff complained, first, of alleged misrepresentations contained in a prospectus; and, secondly, of a series of transactions which were entered into between the company and Mr. *Fernie* and his company.

The branch of the case relating to alleged misrepresentation was twofold.

In the early part of April, 1864, the company issued a prospectus containing a list of directors, consisting of the names and addresses of eleven persons, being the eight above-named Defendants, and three others, namely, Lord *Alan Spencer Churchill*, *Richard Heatley*, and *G. A. H. Holt*, and also containing the following statements:—

"The company will commence operations with six screw steam ships of 2200 tons and 300-horse power, each (having capacity for 2000 tons cargo, thirty-five days' fuel, and accommodation for fifty to seventy first, and a similar number of second-class passengers). . . The vessels are guaranteed to steam ten knots, and, being fairly rigged as clipper sailing ships, are calculated to perform the voyage regularly."

(*a.*) The bill alleged that on the faith of the truth of the statements contained in the prospectus, and in the belief that the persons therein named as directors had consented to act as such, the Plaintiff was induced to apply for fifty shares. His application was made on the 25th of April, 1864, and the shares were allotted to him on the 17th of May. The bill proceeded to state that (1) *the Plaintiff had been informed that some or one of them, i.e., Lord Alan Churchill, R. Heatley, and G. A. H. Holt, attended one or more meetings of the promoters before the shares in the company were*

(1) The passages in italics were introduced by amendment.

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allotted, but the fact was they, Lord *A. Churchill*, *R. Heatley*, and *G. A. H. Holt*, never acted as, or were, directors of the company; nor were they, nor was any of them, ever members or a member of the company; *that if they or any of them ever consented to act as directors, or a director, such consent was withdrawn before the said fifty shares were allotted to the Plaintiff; and that there never had been, and was not now, any properly appointed director of the company.*

(*b.*) The bill further stated, that the Plaintiff had, under the circumstances and by the means in the bill mentioned, lately discovered that the eight above-named Defendants had not, nor had any of them, nor had any one on behalf of the company, secured any ships, either of the size or of the power mentioned in the prospectus. The Plaintiff had been informed that some negotiations had been entered into with builders, *but any contract or agreement for the construction or purchase of any ship or ships for the company had to be given up, and had been given up, in consequence of the small number of shares subscribed for, and the consequent inability of the company to pay for them;* and moreover, that there was no such guarantee as to the speed of the vessels as in the prospectus mentioned.

(*a.*) The company, by their answer, said that the prospectus was, as they believed, drawn by the Defendant *Edmund Thompson*, who initiated the company.

Prior to the first publication of the prospectus Lord *Alan Churchill*, and Messrs. *Heatley* and *Holt*, together with the Defendants *Smith*, *Zahn*, *Wakefield*, *Watson*, *Weguelin*, *Johnston*, and *Ridley*, upon the application of the subscribers to the memorandum of association, or some of them, but which in particular Defendants were unable to set forth, severally consented to become directors. On the 27th of April Lord *A. Churchill*, and Messrs. *Heatley* and *Holt*, attended a meeting of provisional directors, convened by the subscribers to the memorandum. On the 30th of April Lord *A. Churchill* wrote, desiring the removal of his name from the list. The company said that, being advised that in strictness their first directors should be formally appointed by a resolution of subscribers to the memorandum, a meeting of the subscribers was held on the 16th of May, and attended by the Defendants *Wakefield*, *Thompson*, *Johnston*, Mr. *Blythe*, and the Defendant *Ridley*, whereat a

resolution was passed that the Defendant *Colchester*, Messrs. *Heatley* and *Holt*, the Defendants *Johnston*, *De Laski*, *Ridley*, *Smith*, *Wakefield*, *Watson*, *Weguelin*, and *Zahn*, should be appointed first directors (*De Laski* being appointed in the place of Lord *A. Churchill*). On the same 16th of May the Defendant *Smith* retired. On the 10th of June Mr. *Heatley* retired. The Defendant *Zahn* retired on the 12th of July. On the 26th of August the Defendant *Pardoe* was elected. On or about the 20th of October the Defendants *Johnston* and *Wakefield*, and Mr. *Holt*, retired from the direction; and on the 10th of December and the 3rd of January, 1865, respectively, the Defendants *White* and *Dobson* were elected. The directors at the filing of the bill, were *Colchester*, *Weguelin*, *De Laski*, *Ridley*, *Watson*, *Pardoe*, *Fernie*, *Chilton*, *Hall*, *White*, and *Dobson*. The Defendant *White* had since died, and was succeeded by Mr. *Nicholson*. On the 6th of August, 1864, *Thompson* resigned the office of ship's husband.

The fact of the above alleged meeting of the 16th of May having been held was disputed, no entry of it appearing on the minute book of the company.

(*b.*) With respect to the other charge of misrepresentation, the company alleged as follows:—

Par. 12. "It was our intention to commence business with six screw steamships, of such capacity and power as are in that behalf mentioned in the said prospectus; and as soon as practicable after our incorporation, we took such steps as we deemed expedient and proper for carrying our said intention into effect."

They then proceeded to state the particulars of two agreements, dated the 15th of March, 1864, between the Defendant *Thompson* and the *Union Shipbuilding Company* of *Glasgow*, for the purchase by *Thompson* of two iron screw steamers, to be delivered on the *Clyde* on the 31st of December, 1864. These agreements ultimately proved abortive, but at a meeting of the 25th of April resolutions were passed authorizing contracts and negotiations for the supply of a steamer by the *Isle of Man Shipbuilding Company*, of another by the *Millwall Company*, of two others by Messrs. *J.* and *A. Blythe*, of *Limehouse*, and for an offer to a Mr. *W. H. Dixon* of £70,000, of a new steamer building for him on the *Clyde*.

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They admitted that, except as far as the above resolution was concerned, no contract had been entered into on the 25th of April; but they had received offers from several leading ship-building firms, which they named, and negotiations ensued, which ended in no contract. They further said that, after much consideration, and especially having regard to the pending treaties for subsidies, they deemed it most beneficial to their interests to be in a position to state in their negotiations for the same that a service of steamers might, if required, be put to work without delay, and accordingly they entered upon the contract with *Fernie, Brothers, & Company,* which was the subject of the other ground of relief.

As to this second branch of the case, the statements in the bill were to the effect that up to September, 1864, the total number of shares issued was only 6207, of which 800 were issued to the Defendant *Thompson*, and 1885 were issued to the Defendants *Colchester, Johnson, Ridley, Smith, Wakefield, Watson, Weguelin,* and *Zahn,* the so-called directors. In that month the Defendant *Thompson,* hearing that the Defendant *Fernie* was greatly interested in the *British and American Steam Navigation Company, Limited,* a company which wanted to dispose of certain vessels, applied to him for the sale to the company of three steamers, which were then afloat, and arrangements were made whereby it was agreed that *Fernie* and *Chilton* should come on the direction of the company, that the three steamers should be sold to the company by Mr. *Fernie's* company for £160,000, and that *Fernie* and his friends should take 10,000 shares in the company, paying £2 per share, but that the £20,000 thus raised was to be returned to *Fernie,* or his company, as part payment for the vessels. As part of the arrangements, the five above-named Defendants were introduced by *Fernie* and *Chilton;* and *Fernie, Brothers, & Company,* were appointed ships' husbands of the company, in the room of *Thompson.*

The bill alleged that £160,000 was an exorbitant price, and that the result of the arrangements was, that the company became under liability for about £440,000, whereas the total amount of capital issued was only £356,440, of which only one-tenth had been called up, and the rest could not be called up in less than a twelvemonth.

Also that the arrangements were concealed from the Plaintiff, and that by means of them the Defendant *Fernie* had been able to relieve his company of heavy liabilities, and to shift them on to the company; and that the Plaintiff did not become aware of these arrangements, nor of the above-stated misrepresentations, till early in 1865.

These allegations were met by the Defendants *Fernie* and *Chilton*, but the view which was ultimately taken by the Court renders it unnecessary to state the particulars.

On the 7th of February, 1865, the directors of the company issued notices of a call of £3 a share, payable on the 3rd of April. A report of the directors, on the 21st of March, stated the number of shares already allotted to be 18,580. At a meeting of shareholders held on the same day, a resolution was passed that the call should not be paid; but on the 12th of April, a further notice was sent by the company to the Plaintiff and other shareholders, requiring payment of the call. Upon their refusal, actions were brought, and this bill was filed on the 22nd of April, 1865.

After the filing of the bill, a resolution was passed for the voluntary winding up of the company, and on the 3rd of June, 1866, an order was made by the Master of the Rolls for continuing the voluntary winding up under supervision; but a petition for the ordinary winding-up order had been presented by creditors, and was ordered to stand to the hearing of the cause.

The *Attorney-General* (Sir *John Rolt*), Mr. *W. M. James*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiff:—

The statement as to the ships amounts to a guarantee that the company then had in their possession either shipping to the amount of 13,200 tons, or contracts for the purchase of that amount; whereas they had not at that time a single ship, nor had they contracted for the purchase or acquisition of a single ship. This misrepresentation brings the case within *Ross* v. *Estates Investment Company* (1); *Rawlins* v. *Wickham* (2).

None of the directors were ever properly constituted; and it is not competent to them to make calls and carry on the business of the company: *Howbeach Coal Company* v. *Teague* (3).

(1) Law Rep. 3 Eq. 122. (2) 3 De G. & J. 304. (3) 5 H. & N. 151.

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Sir *Roundell Palmer*, Q.C., Mr. *Locock Webb*, and Mr. *F. C. J. Millar*, for the company and the Defendants *Colchester*, *Ridley*, *Watson*, *Weguelin*, *De Laski*, *Pardoe*, *Dobson*, and *Hall*:—

The form of relief prayed is quite new, and is not sanctioned either by principle or authority. The Plaintiff alleging the discovery, early in 1865, of, 1st, misrepresentations, and 2nd, improper dealings (a double case), in April files this bill, not asking to be relieved from his contract, but to be indemnified by his co-shareholders in respect of his liabilities as a shareholder.

But first: The Plaintiff has no right to sue on behalf of himself and all other shareholders, so far as his object is not to get rid of a common contract, but to set aside a particular contract entered into by himself alone. If he sues on the ground of misrepresentation, he can succeed only on the ground of his being a stranger to every one else in the company; he ought to file a bill by himself alone.

Secondly: If a shareholder does not, as soon as he knows that which he thinks gives him an equity to be relieved of his shares, elect to give up the shares at once, he takes them for better or worse; he cannot throw the liabilities of the shares upon any one else.

Thirdly: A shareholder has a right to ask the Court to be relieved from his contract; but he has not a right to ask to be made a trustee for his co-shareholders.

Fourthly: The latter branch of the relief deals with matters of internal management, with which the Court refuses to interfere, unless they have been clearly *ultrà vires*. In this case the course taken by the Plaintiff has been particularly oppressive. If he were about to reject his shares, and deny his position as a shareholder, he had no right to enter into the details of the company's management, whether good or bad. But whilst suing on the ground of misrepresentation, he has availed himself of the opportunity to rip up all the affairs of the company. If he succeeds on the first branch of the case, he must pay the costs of the second.

[In support of the above propositions the following cases were cited:—*Jones* v. *Garcia del Rio* (1); *Carlisle* v. *South Eastern Rail-*

(1) T. & R. 297.

way Company (1); *Nicol's Case* (2); *Ex parte Briggs* (3); *Stewart's Case* (4); *Clarke* v. *Dickson* (5).]

No doubt cases may arise in which a man, upon discovering a misrepresentation by which he has been misled, may have a case against directors, though not entitled to be relieved against creditors—that is to say, creditors not in respect of the contract complained of, but in respect of collateral obligations. But by this bill the original contract is not avoided; the Plaintiff asks to be indemnified against future liabilities. There can be no future liabilities if the contract is void. He studiously avoids being struck off the list of members, wishing to obtain a *locus standi* for a different sort of relief: *Foss* v. *Harbottle* (6); *Mowatt* v. *Blake* (7); *Kisch* v. *Central Railway Company of Venezuela* (8); *Gibson's Case* (9).

The statement as to the directors was true in fact at the time when the prospectus was issued, and when the Plaintiff applied for his shares. Changes had taken place before the allotment; but a company is not bound to communicate to a subscriber every change in the direction that may take place before allotment.

As to the statement about the ships—part of the prospectus is in the present tense—this announcement is in the future. It rests in intention. Every subscriber must have known that at that period the company was not in a position to be paying demurrage on six ships. The question is, was there a substantial mis-statement calculated to deceive, and which did deceive the Plaintiff?

On the second branch of the case, the Plaintiff cannot approbate and reprobate. If we are wrong on the first ground, and the Plaintiff was deceived, we are wrong on grounds which render this Plaintiff a stranger to the company, and wholly disentitle him to come here and complain of its internal management.

Mr. *Kay*, Q.C., and Mr. *Eddis*, for the Defendants *Fernie* and *Chilton*, cited *Curson* v. *Belworthy* (10); *Bellamy* v. *Sabine* (11).

(1) 1 Mac. & G. 689.
(2) 3 De G & J. 387, 441. 5 Jur. N.S. 205
(3) Law Rep. 1 Eq. 483.
(4) Law Rep. 1 Ch. 574.
(5) E. B. & E. 148. 5 Jur. N.S. 1029
(6) 2 Hare, 461.
(7) 31 L. T. 387.
(8) 3 D. J. & S. 122. 11 Jur. N.S. 646.
(9) 2 De G. & J. 275. 4 Jur. N.S. 1005.
(10) 11 Jur. 915.
(11) 2 Ph. 425.

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Mr. *Kay*, Q.C., and Mr. *Bardswell*, for the Defendants *Thompson* and *Smith*.

Mr. *G. M. Giffard*, Q.C., and Mr. *C. T. Simpson*, for Mr. *Fernie's* company.

Mr. *Druce*, Q.C., and Mr. *Aikin*, for the Defendants *Johnston* and *Wakefield*.

Mr. *Locock Webb*, for the Defendant *Zahn*.

The *Attorney-General*, in reply:—

There is a wide distinction between a Plaintiff, as in *Ship's Case* (1) and *Webster's Case* (2), saying, "I come to be relieved from threatened obligations under a supposed contract into which I never entered," and a shareholder asking to be relieved from calls, repaid his advances, and indemnified for the future, on the ground of mis-representation. The Plaintiff alleges a mis-statement, not of the objects of the company, but of a matter of fact, upon the faith and truth of which the public were invited to come in. It may be that the Plaintiff is also entitled to be removed from the list of shareholders, as far as creditors are concerned, but the other remedy is equally open to him: *Rawlins* v. *Wickham* (3). Here there were no directors, no money, and no shares, as stated in the prospectus.

As against *Fernie* and *Chilton*, the five directors, and the American company, *Nicol's Case* (4) shews that the Plaintiff has as much right against these creditors as against the company.

The principle of *Foss* v. *Harbottle* (5) does not apply to the case of a fraudulent attempt by a majority of shareholders to defraud the minority. If the minority either be not called upon for their opinion, or be overborne, the demurrer to a bill filed on their behalf will be overruled: *Mozley* v. *Alston* (6). What can be more inequitable than that the directors of a selling company should come on to the direction of the purchasing company?

There is no distinction whatever in the ground of the relief

(1) 1 D. J. & S. 544. (4) 3 De G. & J. 387.
(2) Law Rep. 2 Eq. 741. (5) 2 Hare, 461.
(3) 3 De G. & J. 304. (6) 1 Ph. 790, 798.

which is given by taking a shareholder's name off the list, and that of relief by an injunction, repayment, and indemnity; in either case the foundation of the remedy is fraud.

The misrepresentation here was, that the company had either ships or contracts; that the ships were either *in esse* or *in posse*, and upon that misrepresentation the Defendants acted. We cannot impeach their conduct as directors, because they were informally appointed; but we impeach them as purporting to act as directors; and we impeach the company. In *Stewart's Case* (1) my contention was, that the identity of the corporation consisted in its name. Here there was no pretence of any appointment of directors until that meeting of the 16th of May.

The *onus* is on the Defendants to shew that the misrepresentation did not mislead the Plaintiff, and it has never been said that misrepresentation which was calculated to mislead, and which did mislead, is not sufficient to avoid a contract.

The question is, not whether a majority of shareholders can condone an injurious purchase by directors, but whether a majority can vote themselves a benefit, so as to bind the minority. We do not say it was *ultrà vires*. We say it was a fraud, and in that case it is idle to talk of internal management.

SIR W. PAGE WOOD, V.C.:—

Upon the latter branch of the case, that which relates to the purchase of the ships from the Defendant *Fernie*, I think I ought not to abstain from giving my judgment at once. As against *Fernie* and *Chilton*, and all those Defendants who were not original directors of the company, namely, *De Laski*, *Pardo*, *Dobson*, and *Hall*, and the *British and American Company*, it appears to me that no case whatever has been established. Much has been said about fraud, but nothing approximating to fraud, as far as I can see, has been brought home to Messrs. *Fernie* and *Chilton*. A case of fraud has, indeed, been suggested by the Attorney-General, where a majority of shareholders resolve to take their own property, and to sell it to the company at a price two or three times its value, thereby cheating the company, who are remediless, as being a minority of shareholders, on the principle laid down in *Foss* v.

(1) Law Rep. 1 Ch. 574.

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Harbottle (1). Such a state of things will not, I think, be difficult to deal with it when it arises, it is sufficient to say that it does not arise here.

First, it was suggested, it was scarcely charged, by the Plaintiff (his counsel did not open it at the bar, and very wisely, for he certainly could not prove it), that an exorbitant price was given for the ships. The Attorney-General says that a profit was made of £25,000. Now, I decline to enter minutely into the question of whether or not more than the exact market price was given; the Defendants have entered into that question, and have produced strong evidence to shew that, under the circumstances, the property was sold for no more than its worth.

Then it is said that Mr. *Fernie* took shares in the company. But it seems to me that so far from Mr. *Fernie* choosing to take shares in the company, they were forced upon him. The company could not buy ships unless the vendors were prepared to take shares. It is in evidence that they offered shares to every other shipbuilder who tendered to supply them. Nor was Mr. *Fernie* to have the sole command of every one of these 10,000 shares; they were distributed amongst him and his friends, and what interest, I may ask, would the friends of Mr. *Fernie* have in perpetrating a fraud against the company?

Upon the former branch of the case, as to which I reserve my judgment, I shall retain on the record all those Defendants who were concerned in issuing the prospectus; but those who came in afterwards are, I think, in a different position. They had no share whatever in that proceeding. The original directors had got themselves into this embarrassment; they had said, "We have everything ready to start: we have our ships and everything ready, as soon as we procure a sufficient quantity of shares in the company to be taken." But when the new directors came in afterwards, they found that the company was not in a condition to start, and they did their best to get the concern floated as soon as they could. They found they should be obliged to buy ships on the terms of the vendors taking shares. The evidence shews that the first builder with whom they proposed to contract was to take shares, it is not said how many; the second was to take 1500 shares; the

(1) 2 Hare, 461.

third, 5000; and the fourth was to take a considerable portion of his purchase-money (£70,000), in shares. After all, Messrs. *Fernie* have taken only 10,000 shares, on which £2 were to be considered as paid up, amounting to £20,000. Then a surprising argument was adduced: it was said that Mr. *Fernie*, being minded to foist ships, which he wanted to get rid of, at an exorbitant and extravagant price on the company, found out a set of foolish people who were disposed to invest a large portion of their capital, and be cheated (he himself coming in for a great share of the cheating), and then said, "I will not hand you over my ships unless upon the terms of having 10,000 shares in the company—you having only 7000—so that henceforth no one shall be able to dispute the contract." I repeat that no case of that kind is proved.

Then it turns out that the ships, so far from being burdensome, are sold with engagements upon them which would produce £10,000. The bill does not state that the sum paid in excess of the market price was more than £25,000, and I am not sure that that £15,000 was an extravagant profit; especially when £10,000 of the price was to be paid in shares. Mr. *James* observed that the witnesses who deposed as to value, all checked themselves by adding, "regard being had to the nature of the transaction." But, of course, the nature of the transaction must be taken into consideration, because it is not to be expected that a man who is about to take shares, will sell his property for the same price as if he were about to receive cash. Then it is to be remarked, that Mr. *Fernie* asked £5000 more than he got; and then he stipulated "that 7000 shares in the company, at the least, be *bonâ fide* subscribed for and allotted to the public, so as to make, with the 10,000 shares to be subscribed for by us, a capital of at least 17,000 shares." The Attorney-General's argument requires that those words "at least," be read "at most." Mr. *Fernie* further stipulates, "that the subscribers to the 10,000 shares be fairly represented at the board." That appears to me a most reasonable stipulation. It was reasonable in him to say: "If I am to enter into a bargain, part of the terms being that I am to start this company, the success of which will depend, in a great measure, upon my management, you must allow me to be fairly represented at the board." The same remark applies to Mr. *Fernie's* stipulation, that he should be the

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ship's husband of the company. Whether that would disqualify him from acting as director, is a question not necessary to be discussed.

I find not a shadow of fraud in the transactions throughout, and I see no ground for setting them aside. I therefore dismiss the bill with costs as against Messrs. *Fernie* and *Chilton*, the four directors I have named, and the *British and American Company*.

Feb. 8. SIR W. PAGE WOOD, V.C.:—

The remaining part of the bill has occasioned me very considerable difficulty, because it raises one of those nice questions upon the very border of the line which must be drawn at some time or other in these cases.

The question is not, and is not attempted by the bill to be, brought within the authority of *Ship's Case* (1). In *Stewart's Case* (2) I endeavoured to point out the distinction between the two classes of cases. On the one hand, there is a prospectus which constitutes an offer to the public of a contract which they may or may not enter into, which in itself contains the whole contract, there being no memorandum and no articles of association; and a man who has assented to that contract cannot be said to have assented to a totally different one, which has never been expressed or made known to him. On the other, a memorandum and articles of association have been actually registered. The prospectus informs the public of that fact, and the person who applies for shares is engaging himself to the articles of association. I think there is a wide difference—and since the affirmation of *Ship's Case* and *Stewart's Case*, I think I may venture to say a sound distinction—between those two classes of cases.

The Attorney-General endeavoured to meet this by a very ingenious argument. He said that in either case it was nothing but a fraud, like any other. The directors secure the subscriber's assent to taking shares in a company with a given name, and they fraudulently tell him that the company with this name has such and such purposes in view, when in truth it is framed for other

(1) 2 D. J. & S. 544. (2) Law Rep. 1 Ch. 574.

and different purposes. But I consider the distinction to be a broad one, and not founded on name. Suppose there were a prospectus issued for an *Eagle Insurance Company*, stating that it was for insurance against accidents by fire, I apprehend it would be impossible for the company, having obtained a man's assent to that prospectus, to register him as a member of a company of the same name which granted insurances on lives. The name has nothing to do with it; the contract is the thing. They might change the name, and call the company the *Pelican*, still, if the contract remained the same, a subscriber would be bound by it. The subscriber cannot say that what he agreed to was to become a member of a society with a particular name; and the promoters cannot say the subscriber has agreed to become a member of a society for purposes totally different from those originally laid before him.

In deciding this case, therefore, I think *Ship's Case*, *Stewart's Case*, and others of that kind, are entirely to be put aside. Here the memorandum and articles containing the contract were registered about a month before the prospectus was issued; therefore all persons who proceeded upon the prospectus had knowledge of and were bound by the articles.

Now, the prospectus gave notice that the company was registered under a certain name. That was a true statement. The Plaintiff, therefore, could not rely upon any ground of want of authority in those who undertook the management of the concern to register him as a person participating in the society and its objects, and bound by the articles. That is important in this respect. The Plaintiff would see by the articles that there was no specification of any particular ships bought or to be used for the purposes of the concern. The business was to be the providing ships for making these voyages, and the only one of the articles of association of any importance is that which provides that the directors shall be at liberty to commence business, although the whole of the funds of the society should not have been subscribed. That being the case, the Plaintiff complains, and, I think, with a great deal of reason, of the statements in the prospectus. [His Honour stated the two grounds of complaint, and continued:—] He says that in that state of things he has been defrauded, he has been led by false repre-

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sentations to join in a partnership which he should otherwise never have joined in; and the frame of the bill is founded on the consideration that he may or may not be bound by the contract as between his co-partners, or so far as the claims of creditors may be unsatisfied, but that he has a right, as against the directors and against the company, to be indemnified from the consequences of his being placed on the list.

In *Ross* v. *Estates Investment Company* (1), the question was one of fraud in the prospectus, as distinguished from want of authority to make the contract. [His Honour stated that case, and continued:—] It appeared to me that the Plaintiff, in that instance, had established a right to be relieved altogether from the consequences of his contract. I had not occasion to consider any questions between the Plaintiff and his co-shareholders, or between him and possible creditors of the company. I apprehend that, considering the circumstances of that case, and the immediate application made by the Plaintiff upon his discovery of the facts—a feature which is always of very great importance—I should have taken the same course, even if the question of creditors had been brought before me—that is to say, of creditors who had not taken any proceedings. That Mr. *Ross* was entitled to indemnity I have not the slightest doubt; and if the case of the present Plaintiff could have been put so high as that of Mr. *Ross*, he would have been entitled to the same relief.

The great difficulty here has been the nature and character of the alleged misrepresentation. First, as to the directors, I think the Plaintiff's case fails. The Plaintiff says that the prospectus puts forth what appears to be a constituted board; that there never was a regularly constituted board; that in order to constitute a board there should have been a regular meeting; that some sort of evidence is given of a meeting for the purpose on the 16th of May; but that no minute book with any record of such a meeting has been produced. Some discussion took place as to the admission of a minute book as evidence on this subject at the late stage of the cause when it was tendered; but I thought it unnecessary to continue that discussion, as the question appeared to me to be immaterial. By the *Companies Act*, the majority of

(1) Law Rep. 3 Eq. 122.

the persons signing the articles of association are competent to form a board of directors. I very much doubt whether it is necessary that those persons should meet together. If any one of the subscribers to the contract raises a question, he may be entitled to say, "I will not have this decided without a meeting of us all;" but if they all concur (as in this case), it seems to me hypercritical to say the appointment was irregular. To go further, and say, as this Plaintiff has said, that it was a fraud, appears to me to be idle. Everything was done by them with the *bonâ fide* intention that the directors named should act; and I cannot allow the Plaintiff to escape from his contract on an allegation of fraud of this nature. As regards the three persons, the mention of whose names is complained of, it appears that Lord *Alan Churchill* had actually taken his place at the board before the issuing of the prospectus, and Mr. *Heatley* and Mr. *Holt* continued to act for some time afterwards. Shortly after the issuing of the prospectus, and before the allotment of shares, Lord *Alan Churchill* retired; but it appears to me monstrous to say that a Plaintiff is entitled to set aside a contract of this description, on the ground that since his application and before his shares were allotted, some change in the direction took place which was not communicated to him.

The more serious part is that which remains. The company are entitled to the observation that there is a great deal of very important matter in the prospectus, such as the statements as to the amount of exports of British manufacture to *Brazil*, the number of tons of shipping employed, the amount of annual exports from *Chili*, and so forth, which neither the Plaintiff nor any one else has thought fit to dispute. There is another statement, which is not altogether unimportant, which is as follows: "The Chilian Government has long wished to see such a line established, and some years ago offered a subsidy for the purpose; it is hoped that, at the least, liberal concessions will be obtained not only from the Chilian, but also from the Peruvian, Argentine, and Brazil governments, which will tend to facilitate the operations of the company." I ought, in justice to the company, to say that this statement appears to be by no means unauthorized; the evidence shews that the Chilian Government were disposed at one time to offer a sub-

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sidy of this description, and there are proofs of a *bonâ fide* intention on the part of the company to work the thing out.

Assuming then, as established, the *bonâ fide* intention of the company, not only in this, but in the transactions with Mr. *Fernie*, I am bound to say I cannot read the statements complained of in any other light than as statements that the company do not intend to start till they have the six ships; and that, in the event of the company being formed, there exists a conditional contract, or something of that kind, whereby ships of a given character are secured. It is impossible to say that the idea is not held out, that the six ships are, to a certain extent, in hand, that they can be obtained by means of a contract depending on the contingency of the company being formed in a given time, by which I apprehend is meant, sufficient shareholders being obtained for the purpose. That being the construction of the statement (and the Defendants themselves do not ask me to put any other upon it), I have further the fact that they actually had a contract for two ships of the character described in the prospectus, contained in two several agreements between the Defendants *Thompson* and the *Union Ship Building Company* of *Glasgow*. They had no contract for the four other ships, and they afterwards found considerable difficulty in obtaining them upon favourable terms, being obliged to contract on the terms of the vendors having to take shares in payment. The Defendants, in their answer, do not say they did not intend the public to believe they had the six ships. They avoid that altogether; they put it entirely upon construction. But any one reading the prospectus would, I think, suppose that they at least had a contract for all the ships similar to Mr. *Thompson's* contract for the two.

The Plaintiff's case, I think, is entirely free from laches, nor can it be said that he did not rely on the prospectus. It is clear that he never knew that there was no such contract with regard to the six ships until February, and that in that month, or soon after, he began to complain. In the September preceding, he had redemanded his deposit on totally different grounds, shewing that he did not know of this particular ground, if it existed.

The question, then, is simply reduced to this: Was there or was there not such a misrepresentation as that I can relieve him

from the contract on the ground of it? and, after much hesitation, I have come to the conclusion that there was not. I am not unmindful of the observation of Sir *T. Plumer*, in *Clermont* v. *Tasburgh* (1), cited by Lord Justice *Turner*, in *Rawlins* v. *Wickham* (2): "The effect of partial misrepresention is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it." Consequently, I do not proceed upon the ground that this was a comparatively small portion of the representations made by the company; but I have come to the conclusion on this ground: I think, as I have said, the statement cannot be put lower than this, that the company have these contracts in hand; and, on the other hand, it cannot be put higher than this, that the Plaintiff and other subscribers are informed that there is about to be an issue of shares, and that the contracts are secured in the event of the shares being sufficient for the purpose. But then the Plaintiff was aware of the existence of the articles of association. From them he would discover that there was no direct contract or engagement referred to either as to these particular ships, or with reference to any particular class of ships; he also knew the power of the directors to manage the whole concern, and that it might be part of the determination of the directors, when they met, to set aside all these contracts, if they should think it beneficial to the company that a different class of ships should be brought in, and a different set of operations proceeded with. The case, therefore, differs widely from *Ross's Case*, where the statements were, that half the issue of shares was out, that the company had got the money, and had bought the two estates. Assuming the representation in this case to amount to this: "We have a provisional contract as to these ships, contingent upon our getting money enough subscribed, and if you, the public generally, are desirous of coming into our scheme, here is the contract as to the particular class of ships and mode of sailing, upon which it is our intention to proceed;" and it turns out that instead of an agreement for the purchase of six ships, they have only a bargain for the purchase of two, is that misrepresentation of the essence of the contract into which the Plaintiff entered with this company? In *Ross's Case* it

(1) 1 Jac. & W. 112. (2) 3 De G. & J. 304, 321.

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appeared to me to be of the very essence of the contract that the particular estates—said to be valuable as building land—had been actually bought and acquired. In the present case, it cannot be said, even if the company had no contracts for ships at all, that there were not other ships in the market of exactly the same quality; for, be it observed, nothing is mentioned about price, only the class of ships with which the company is going to work.

The Plaintiff says, that, taking the statement as to the board of direction with the supposition that the ships were in hand, he believed that the whole business of the company was ready to start. But then there are the articles which give to the directors full power with reference to the starting or non-starting of the company, of abolishing these contracts, if they pleased, and entering into others; and further, we have the whole question reduced to one of time, because the particular class of ships might have been bought just as well after the prospectus had been issued, and the money had come in, as before.

The Plaintiff's ground of complaint is brought to this: "I believed you were ready to start, and that you would start a great deal sooner than you did." I think it would be too dangerous to say that that amount of misrepresentation is one which will go to the root of, and vitiate, the whole contract. The case is not within the observation of Sir *T. Plumer*, that if the contract is vitiated in part, it is vitiated *in toto*. It appears to me that it is not vitiated in any respect by the single circumstance of a statement, bearing only on the question of the starting of the company, a thing in itself necessarily uncertain, depending upon the amount raised by subscriptions, and the time within which they can be got in.

But the case is so near the border, that I have felt great difficulty about it, and in dismissing the bill, I dismiss it without costs as against the original directors. The representation was never justified, and was not warranted; and it is to be regretted that in a prospectus so truthful in a large portion of its statements, the directors should have condescended to such a misrepresentation.

Solicitors for the Plaintiff: Messrs. *Torr, Janeway, & Tagart*, Agents for Messrs. *Grundy & Davies, Manchester.*

Solicitors for the Defendants: Messrs. *W. & H. P. Sharp*;

Messrs. *Flux & Argles*, agents for Messrs. *Hull, Stone, & Fletcher, Liverpool;* Messrs. *Marshall & Roberts*, agents for Messrs. *Lace, Banner, Littledale, Gill, & Bardswell, Liverpool;* Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Bateson, Robinson, & Morris, Liverpool;* Messrs. *Slater & Dommett*, agents for Messrs. *Slater & Barling, Manchester.*

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V.-C. W. 1867 *Feb.* 11, 19.

Railway Company—Debenture Holders—Judgment—Execution—Receiver—Companies Clauses Act, ss. 42, 44.

After the appointment of a receiver of a railway undertaking, made in a suit on behalf of debenture holders, a debenture holder recovered judgment at law, and petitioned for leave to issue execution :—

Held, that the Petitioner was not entitled to issue execution otherwise than as a trustee for himself, and all other debenture holders entitled by the special Acts to be paid *pari passu* with himself; but an inquiry was directed whether it would be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making the judgment available for them.

THIS was a Petition presented by *Abraham Howell.*

On the 1st of March, 1861, the *Brecon and Merthyr Tydfil Junction Railway Company* (whose Act, 22 & 23 Vict. c. lxxxiv., passed in 1859, incorporated the *Companies Clauses Consolidation Act*, 1845), issued a debenture to *David Morgan*, in the following form :—

"*Brecon and Merthyr Tydfil Junction Railway Company.*

"DEBENTURE.

"£400. No. 17.

"By virtue of an Act passed in the 22nd and 23rd years of the reign of Her Majesty Queen *Victoria*, intituled 'An Act for making railways in the district between *Brecon* and *Merthyr Tydfil*, and for other purposes,' and of the several Acts of Parliament incorporated with the same Act, we, the *Brecon and Merthyr Tydfil Junction Railway Company*, in consideration of the sum of £400 paid to us by *David Morgan*, of *Welshpool*, in the county of *Montgomery*,

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Calvinistic Methodist Minister, do assign unto the said *David Morgan*, his executors, administrators, and assigns, the said undertaking, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in and to the same, to hold unto the said *David Morgan*, his executors, administrators, and assigns, until the said sum of £400, together with interest for the same at the rate of £5 for every £100 by the year, shall be fully paid and satisfied. And it is hereby stipulated that the said principal sum of £400 shall be repayable and repaid on the 1st day of March which will be in the year 1866; and that, in the meantime, the said company shall, in respect of the interest on the principal sum, pay to the bearer of the coupons and interest warrants hereto annexed respectively, the several sums mentioned in such warrants respectively, at the several times therein respectively specified.

"Given under our common seal, this 1st day of March, A.D. 1861.

"Sealed by order of the Board of Directors. (L.S.)

"*John Williams* (Secretary).

"Entered, *J. R. Cobb.*

"N.B.—All transfers of this security must be registered at the office of the company in *Brecon* within thirty days after the date of the deed of transfer."

By deed of the 16th of October, 1861, this debenture was assigned by *Morgan* in consideration of £400, to the Petitioner, who, on the 17th of July, 1866, brought an action against the company; and on the 6th of December, 1866, judgment was signed for the sum of £512 12*s.* 6*d.*, for principal, interest, and costs, £500 being the sum at which damages were laid. The sum due to the Petitioner was £426 3*s.* 6*d.* On the 11th of December, 1866, a writ of *fi. fa.* in execution of the judgment, was issued and forwarded to the sheriff of *Brecknock.*

Meanwhile, on the 5th of November, 1866, a bill was filed by *John Mortimer Bowen*, on behalf of himself and all other the original debenture holders of the company, against the company, and nine persons who respectively represented debenture holders of the company under subsequent extension, amalgamation, and other Acts relating to the same company, passed in 1860, 1861,

and subsequent years; praying that an account might be taken of what was due to the Plaintiff for principal and interest upon the security of his mortgage; and for an account of what was due for principal and interest to the other mortgagees of the undertaking and tolls; and for a receiver and injunction. In this suit an interlocutory order was made on the 15th of November, 1866, appointing *William Roberts* the secretary of the company, and *Alfred Henshaw* the traffic manager, receivers and managers of the whole undertaking of the railway, and to receive the tolls and sums of money in the bill mentioned; the order to be without prejudice to any question in the cause. The cause had not yet come to a hearing. Notice of the order was given to the Petitioner on the 3rd of December.

The sheriff, finding the receivers and managers in possession under the order, refused to execute the writ without the sanction of the Court.

This Petition was accordingly presented, praying that *Roberts* and *Henshaw* might be directed to pay to the Petitioner the amount of the judgment debt, with interest at £4 per cent. from the date of the judgment, out of any moneys in their, or either of their, hands arising from the undertaking or the tolls, or that the Petitioner might be at liberty to levy and execute the writ of *fi. fa.* upon the goods and chattels of the company, and also to sue out and execute an *elegit* upon the lands and her editaments belonging to the company.

Mr. *G. M. Giffard*, Q.C., and Mr. *Fry*, for the Petitioner :—

The prayer of the Petition follows that in *Potts* v. *Warwick Canal Company* (1), where leave was granted to sue out execution, following *Russell* v. *East Anglian Railway Company* (2).

By the 42nd section of the *Companies Clauses Act* (3), one mort-

(1) Kay, 142.

(2) 3 Mac. & G. 125.

(3) The following clauses of the *Companies Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 16), were referred to :—

"Sect. 41. Every mortgage and bond for securing money borrowed by the company shall be by deed, under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage deed or bond may be according to the Form in the Schedule C., or D., to this Act annexed, or to the like effect."

"Sect. 42. The respective mortgagees shall be entitled, one with another, to their respective proportions of the tolls, sums, and premises com-

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gagee is not to have priority over another; but the operation of the section is expressly confined to the property comprised in the mortgage. There is nothing to shew that we have not a right to the fruits of an action against property not so comprised. We admit we cannot touch what is in the assignment.

Why should the action be interfered with by this Court, when a Court of law is competent to decide everything in the action?

The effect of an instrument of this sort is defined in *Hart* v. *Eastern Union Railway Company* (1), affirmed on appeal; *Eastern Union Railway Company* v. *Hart* (2). It extends to a pledge of the undertaking and tolls; not of the stock or chattels of the company as carriers, nor of the soil of the railway. This particular assignment, moreover, does not include future calls.

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prised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned, to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized."

"Sect. 44. The respective obligees in such bonds shall proportionally, according to the amount of the moneys secured thereby, be entitled to be paid out of the tolls, or other property or effects, of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise howsoever."

"SCHEDULE C.

"*Form of Mortgage Deed.*

"The Company.

"Mortgage, No. , £ .

"By virtue of [*here name the special Act*], we, 'The , Company,' in consideration of the sum of pounds paid to us by *A. B.*, of , do assign unto the said *A. B.*, his executors, administrators, and assigns, the said undertaking [and (*in case such loan shall be in anticipation of the capital authorized to be raised*) all future calls on shareholders], and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same; to hold unto the said *A. B.*, his executors, administrators, and assigns, until the said sum of pounds, together with interest for the same, at the rate of for every one hundred pounds by the year, be satisfied [the principal sum to be repaid at the end of years from the date hereof (*in case any period be agreed upon for that purpose*)], [at *or any place of payment other than the principal office of the company*]. Given under our common seal, this day of , in the year of our Lord ."

(1) 7 Ex. 246.

(2) 8 Ex. 116.

The VICE-CHANCELLOR, in the course of the argument, observed that the appointment of a manager by the order of the 15th of November was erroneous.

Mr. *W. M. James*, Q.C., and Mr. *Eddis*, for the Plaintiff in the suit, representing the original debenture holders :—

The Petitioner cannot interfere with that which is the subject of jurisdiction in this Court. No order has been obtained to disturb the appointment of receivers and managers, and that order was made without prejudice to any question of priority between the debenture holders.

A creditor is not to be allowed to sweep away that by which the income of the undertaking is earned.

Mr. *Daniel*, Q.C., and Mr. *Horton Smith*, for the company :—

This is not the case of an ordinary creditor. In *Potts* v. *Warwick Canal Company* (1), and *Russell* v. *East Anglian Railway Company* (2), the applicants were simple contract creditors. The Petitioner is a specialty creditor, the covenant being collateral only to the original security. He is suing also under an instrument which is in a common form with others, and which must be subject to the provisions of the *Companies Clauses Act*.

We say that the property attempted to be reached by this application is in terms, and if not in terms, at least by implication, within the language of the debenture.

In *Bolckow* v. *Herne Bay Pier Company* (3) an action was permitted, but that was on a bond; and the covenant here being collateral only, does not bring this case within that decision.

The statute says there is to be no preference by reason of priority of date. That cannot mean that there is to be a race between debenture holders, as will be the consequence if this application succeeds: *Kennett* v. *Westminster Improvement Commissioners* (4). The effect of granting the prayer of this Petition will be to repeal the statute.

The true principle is, that the debenture holder must use his remedy for the benefit of all in the same class. He is not to have

(1) Kay, 142.
(2) 3 Mac. & G. 125.
(3) 1 E. & B. 74.
(4) 11 Ex. 349.

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execution, except for the common benefit. This is the principle of *Furness* v. *Caterham Railway Company* (1), where it was held that a debenture holder is entitled to neither a foreclosure nor a sale.

The decision of the Lords Justices in *Gardner* v. *London Chatham and Dover Railway Company* (2), which probably gave rise to this application, applies mainly to superfluous lands.

If the Petitioner succeeds, he will not take the fruit only, but the tree itself will be cut down.

Mr. *E. Charles*, for Defendants in the suit, representing subsequent classes of debenture holders:—

In the view of this Court, a debenture holder who has obtained a judgment, will be regarded as a trustee of the judgment for the benefit of himself, and all the rest: *Fripp* v. *Chard Railway Company* (3); *Fairtitle* v. *Gilbert* (4).

Mr. *Giffard*, in reply:—

In *Hart* v. *Eastern Union Railway Company* (5), the form of instrument was special; so in *Kennett* v. *Westminster Improvement Commissioners* (6).

It appears, from *Gardner* v. *London Chatham and Dover Railway Company*, that debentures do not extend to rolling stock, any more than to superfluous lands.

In *Bolckow* v. *Herne Bay Pier Company* (7) the only question was, whether the bond was a good bond.

If the construction of the Act be such as is contended for on the other side, a debenture holder who has got a judgment will be in a worse position than a simple contract creditor who has got judgment, and it is impossible to see how he is to be paid.

Feb. 19. SIR W. PAGE WOOD, V.C.:—

This Petition raises a question which, as far as I am aware, has never been expressly decided before—namely, whether a creditor of a railway, or of any other company, being the holder of

(1) 27 Beav. 358.
(2) Law Rep. 2 Ch. 201.
(3) 11 Hare, 241.
(4) 2 T. R. 169.
(5) 7 Ex. 246.
(6) 11 Ex. 349.
(7) 1 E. & B. 74.

a mortgage in the statutory form of a debenture of the company, is entitled to sue out execution on a judgment which he has obtained at law, in an action on the same instrument, after a bill has been filed by all the holders of mortgage securities of the same class, and a receiver appointed in that suit. It is obvious that if a debenture holder be held to be so entitled, it will lead to great inconvenience; but, nevertheless, the exact legal position of a creditor under such circumstances has to be considered before any decision upon such a Petition as this can be arrived at.

By the debenture—which is very much in the common form—in consideration of the sum of £400 borrowed by the company, they assign to the mortgagee the undertaking, and all the tolls and sums of money arising by virtue of the special Act, and all the estate, right, title, and interest of the company, to hold to him until the same shall be paid, with interest at 5 per cent. Then it is "stipulated"—which is the same thing as "covenanted"—with the mortgagee that the company will pay the same on or before the 1st day of March, 1866, the mortgage itself being dated the 1st day of March, 1861.

The instruments under which money has been raised within the powers of the Act are necessarily dated at various times, and accordingly it appears that the mortgage of the Plaintiff in the suit is dated on the 16th of November (instead of March), 1861, and is made payable on the 16th of November, 1866.

The interests of persons holding mortgages of this description must be determined by the provisions of the company's general Act. By that statute two classes of securities are provided for persons from whom the company may borrow money. The company may borrow either by mortgage or bond. The mortgages, according to the form prescribed by the general Act, simply say that the money is to be repaid by a given day. This provision, as the Courts of law have held, entitles persons to sue and recover judgment.

Now the 42nd section of the Act seems to divide itself into two parts. Creditors are entitled, rateably, in proportion to their several principal debts, to the "tolls, sums, and premises" comprised in their mortgages; and, further, they are entitled to be repaid their debts with interest, which seems to me to mean, entitled to be

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repaid generally, and not merely out of tolls. Then they are to be repaid such sums and interest "without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized."

As to the bonds, it is only necessary to refer to them with regard to one particular point. They are mentioned in the 44th section in a different manner. Bondholders are not assignees of the undertaking and tolls; they are only declared to be "entitled to be paid out of" the tolls, or other property, in the manner stated. As to bonds, I apprehend the present question could not arise, because a bond is a thing only to be secured by a judgment, unless a special receiver be appointed under the Act; and it would clearly be against the very words of the section to say that, when a judgment is the only remedy of a bond creditor, any bond creditor is to be preferred to another, in respect of his judgment.

[His Honour stated the circumstances of the institution of the suit, and appointment of a receiver, adding that the appointment of a manager was made by inadvertence; and continued:—]

The mortgage is a mortgage only of the tolls and sums of money arising by virtue of the Acts. By their Act the company has power (though they are not compelled to do so) to run engines, and to keep rolling stock for that purpose. They had also power to take tolls up to a specified amount; and I take it all the sums they were authorized by virtue of their Act to receive, passed by the mortgage. The recent decision of the Lords Justices in *Gardner* v. *London Chatham and Dover Railway Company* (1) shews that all that debenture holders can claim is the actual fruit resulting from the carrying on of the business of the company—namely, the tolls, rates, and duties, which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their line.

In that state of things, a receiver having been appointed on behalf of all the debenture holders, the Petitioner is in all respects in the same position as others in the same class. Having obtained a judgment, I apprehend that, according to the decision in *Russell* v. *East Anglian Railway Company* (2), if he had been a simple contract creditor, and not a mortgage creditor affected by the pro-

(1) Law Rep. 2 Ch. 201. (2) 3 Mac. & G. 125.

visions of the 42nd section, he would have been entitled to levy on the rolling stock and any other chattels of the company, which are not indispensably necessary for fulfilling the purposes of the Act. It appears to me the carrying business is not one that is indispensably necessary for the purposes of the Act; it is only a power, and not a thing which the company by their Act are necessarily bound to do.

Then what is the position of a mortgage creditor? The 42nd section seems very express; but when it is compared with the 44th it seems to admit in some degree the Petitioner's contention. He submits that he is entitled, not to have any preference by reason of the priority of his mortgage, but only to have priority by reason of his superior diligence in acquiring a judgment. And then he says the language of the 44th section is that one *bond creditor* is not to have advantage over another "by reason of priority of date, *or otherwise howsoever*," whereas the *mortgage creditor*, by sect. 42, is not to have preference "by reason of priority of date," only; shewing that the Legislature intended that the bond creditor, after proceeding to judgment, should be in a different position from the mortgage creditor. I do not think that that reasoning is sound. Observe the consequences that would follow if the mortgage creditor were allowed, by reason of the priority of his judgment, to obtain the security in question. These debentures are issued at various dates, and as, by the custom of the company, the time of repayment is fixed at a given number of years from the date, it follows that there are various degrees of priority in repayment, and if mortgage creditors were enabled to obtain priority by reason of superior diligence, any mortgage creditor would be able to recover as against all the subsequent mortgage creditors. But it does not rest on the custom of the company, for the 51st section of the general Act provides that "if no time be fixed in the mortgage deed or bond for the repayment of the money so borrowed, the party entitled to the mortgage or bond may at, or at any other time after, the expiration of twelve months from the date of such mortgage or bond, demand payment of the principal money thereby secured"—when I apprehend a right of action would accrue. Therefore, if I were to hold that a mortgage creditor, holding one of these securities, was entitled, as soon as he could recover judgment, to get priority over all the other creditors,

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the consequence would be, that he would be held entitled to be paid as the Act says he shall not be paid; for the Act expressly says these mortgage creditors shall be repaid the sums advanced with interest, without any preference in respect of priority of date. But if the mortgage creditor were entitled to levy execution he would gain such preference, for the first set of mortgages would ripen into action, so as to enable an action to be brought before the second set of mortgagees could bring any action.

The receiver has been appointed to receive all the moneys earned by tolls, and all the money earned by the company as carriers besides the tolls, and he is to receive them for the benefit of the debenture creditors. In other words, according to the language used in the judgment of the Lords Justices, to which I have referred, he is to receive all the fruit arising from the tree—which tree consists of plant, rolling stock, and the railway itself. It is impossible, then, looking at the 42nd section, to hold that any mortgage creditor can be permitted to cut down the tree by virtue of his judgment, and thereby obtain payment. Such a course would be inconsistent with the whole purview and scheme of the Act, for the result would be, that the moment debentures fell due there would be a rush of the holders to obtain judgments—and the company, I suppose, could not confess judgment—so that enormous expense would be incurred which would be entirely wasted, and those who had advanced their money would find themselves ousted of their property when the time came for payment, for they would find the company deprived of its power of carrying on business through the acts of other debenture holders who, they supposed, were on the same footing as themselves. Looking at the whole Act, it appears to me that the real intent of the Legislature was, that parity of possession shall be given to those who have parity of security.

This conclusion is, I think, fortified by the view taken by the common law Courts in *Fairtitle* v. *Gilbert* (1) and *Kennett* v. *Westminster Improvement Commissioners* (2). In both these cases, no doubt, the Defendants were public Commissioners, not having rolling stock or chattels, and not carrying on any part of the business for their own benefit; but the expression of the Court was, that they must be regarded as trustees for all those who

(1) 2 T. R. 169. (2) 11 Ex. 349.

had taken security, and must hold an even hand between them. In *Fairtitle* v. *Gilbert* the principle was carried to a great length, for in that case there had been an actual demise of the toll-house to one mortgage creditor—the other mortgage creditors not having the toll-house included in their securities—and the Judges held that demise void; for although no person can aver or plead anything against his own deed, yet it was held that public Commissioners might set forth what they had done upon an erroneous view of their public duties, and shew that what they had done was *ultrà vires*. In the other case, what was said by the Judges on the occasion of leave being asked of them by a judgment creditor claiming under one of these classes of securities, to attach property in the hands of a garnishee, was, in one sense, *obiter dictum*. But, in another sense, they acted on that view, because they said, "It is clear you are asking us to give you leave to do something which you could not do without our leave. We will not give you leave to attach money in the hands of the garnishee, for if we do, you will gain a preference over other creditors."

With regard to the last view—namely, as to a simple contract creditor, according to the principle of *Russell* v. *East Anglian Railway Company* (1), coming in and taking the property, it has occurred to me that it might possibly be for the advantage of the debenture holders that one or more of them should obtain judgment to an amount sufficient to cover the assets, which might be available as against the claims of other creditors who may subsequently come in, and destroy the property.

Therefore the order I now make is this (subject, of course, to anything that may be done by the parties by way of arrangement):—The Court being of opinion that the Petitioner is not entitled to issue execution in respect of his judgment, otherwise than as a trustee for himself and all other debenture holders of the company, entitled under the various Acts of Parliament to be paid *pari passu* with the Petitioner, direct an inquiry at Chambers, in the Petition and in the suit, whether it will be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making such judgment available for the benefit of such creditors.

(1) 3 Mac. & G. 125.

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His Honour added that the company might clearly confess judgment on behalf of all the mortgage creditors; but not on behalf of any one: and he should have thought it better if some creditor had obtained judgment, if possible, of sufficient amount to cover the whole value of the stock.

Solicitors for the Petitioner: Messrs. *N., C., & C. Milne.*

Solicitors for the Plaintiff: Messrs. *Gawthrop & Drew,* agents for Mr. *W. P. Price, Brecon.*

Solicitors for the Defendants: Messrs. *Wilkins, Blyth, & Marsland.*

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ATTORNEY-GENERAL *v.* CORPORATION OF BIRMINGHAM.

Municipal Corporation—Borough Fund—Local Acts—Street Improvement Rate—Municipal Corporation Mortgages Act, 1860*—Expenses of widening Street—Out of what Fund payable.*

By a local Act, passed in 1851, certain property before vested in commissioners, was vested in the corporation of *Birmingham.* Powers were given to the council of purchasing land for the purposes of the Act, and of executing certain improvement works specified in a schedule; the expenses of the works for making new approaches to the town hall, and for enlarging and altering the existing streets, to be defrayed by a "street improvement rate," not exceeding 6*d.* in the £1, and mortgageable to the extent of £100,000; and all other expenses of carrying the Act into execution to be defrayed by a "borough improvement rate" not exceeding 2*s.* in the £1, and mortgageable to the extent of £150,000. From the street improvement rate certain classes of persons were wholly exempted, and canal and railway companies were in part exempted. Nothing therein contained was to alter any of the powers, privileges, and authorities vested in the corporation by any past or future acts in relation to municipal corporations. By another local Act, passed in 1861, certain other specified improvements were provided for, and it was declared that the expense of (amongst other things) widening and improving certain specified streets were to be defrayed out of the "street improvement rate." The *Corporation Mortgages Act,* 1860, empowers corporations generally, with the approbation of the Treasury, upon application made after due notice given, to make purchases of land for public purposes; but nothing therein contained is to "repeal, abridge, or affect," any power or authority of any body corporate or council, under any local Act.

The corporation of *Birmingham* having contracted for the purchase of

land for the widening of a street (not comprised in the works specified in the local Acts of 1851 and 1861), and having (after due notice given, and after all parties interested in the scheme had been heard before a commissioner deputed by the Treasury) obtained the sanction of the Treasury to the purchase of the land, and the charging of the borough fund with the purchase-money :—

Held, upon construction of the statutes, that the corporation were lawfully empowered to raise the purchase-money out of the "borough fund."

THIS was an information at the relation of the guardians of the poor of the parish of *Birmingham*, and *Thomas Avery* and *William Holliday*, two ratepayers of the borough, against the mayor, aldermen, &c., of the borough, and *Thomas Standbridge*, the town clerk, praying for a declaration that, according to the true intent and meaning of the *Birmingham* Improvement Acts, a sum of £2700, agreed by the council of the borough to be paid for the purchase of eighty-five square yards of land in *Bull Street, Birmingham*, for the improvement of the street, was payable out of and chargeable upon *the street improvement rate, and not out of the borough rate*, or borough funds; and that the said sum could not be lawfully raised upon the security of a mortgage of the borough rate or the borough fund; and for an injunction accordingly.

The contract was entered into shortly before March, 1865, and the corporation, who had paid the purchase-money, were about to recoup themselves out of the borough rate, being, according to their view, authorized so to do by the powers of the *Municipal Corporation Mortgages Act*, 1860. The relators, on the other hand, relied upon the provisions of the *Birmingham* Improvement Acts, 1851 and 1861 (1).

(1) The following sections of Acts of Parliament were read and commented on :—

By the *Municipal Corporations Act* of 1835 (5 & 6 Will. 4, c. 76), sect. 92, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging to any borough, are to be paid to the treasurer, to the account of a fund to be called "The Borough Fund;" and such fund is to be applied to the purposes therein specified; and if the fund be insufficient, the council is authorized from time to time to order a "borough rate," in the nature of a county rate, to be made within the borough. Sect. 94 forbids the council from selling, alienating, or leasing (other than corporate or collegiate property, building or garden land) for a longer term than thirty-one years; but provides that it shall be lawful for the council, with the approbation of the Lords Commissioners of Her Majesty's

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The information stated that by royal charter, granted by letters-patent of the 31st of October, 1838, the Parliamentary borough of *Birmingham* was converted into a municipal borough under the Act of 1835; but the borough had not and never had any property out

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Treasury, to sell, alienate, and demise any of the lands of the body corporate in such manner, and upon such terms and conditions, as shall have been approved by the said Lords Commissioners.

By the 6 & 7 Will. 4, c. 104 (passed in 1836) the power of disposition allowed to be exercised with the consent of the Treasury, was extended to dispositions by way of absolute sale, or by way of exchange, mortgage or charge, demise or lease, and to every other disposition which should be so approved of.

The *Birmingham Improvement Act*, 1851 (14 & 15 Vict. c. xciii.) was passed for transferring to the corporation of *Birmingham* the estate and effects then vested in certain commissioners having jurisdiction over parts of the borough, and to provide for the better draining, lighting, paving of, and supplying water to the borough, &c. By the 5th section, the limits of the Act were to be the municipal boundaries of the borough of *Birmingham*. By the 6th section, all the public buildings, messuages, lands, and hereditaments, immediately before the 1st of January, 1852, vested in the commissioners, and all moneys, securities for money, and personal estate then vested in them, were thereby vested in the corporation; and by the 7th section all debts of the commissioners were to be paid by the corporation out of the borough improvement rate. By sect. 9, three former local Acts (31 Geo. 3, c. xvii.; 9 Geo. 4, c. liv.; and 8 & 9 Vict. c. cxciv.) were repealed, but without prejudice to any acts or proceedings previously had, transacted, or commenced under the said Acts, and to any demands or liabilities by reason or in consequence thereof then existing. The statute (sect. 46) embodied clauses 66 to 74 of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34), with reference to the setting forward and setting back of houses and other matters, and enacted (sect. 63), "that no application shall be made to Parliament by the council of the borough for further powers, or for power to raise further sums of money for the purposes of this Act, or for the purposes of any further or other Act, until the council shall, by notice given for two consecutive weeks in at least two of the newspapers published in the borough, have called a public meeting of the ratepayers of the borough, at which meeting the council of the borough shall cause to be stated the object of the intended application to Parliament, nor unless at such meeting the council shall be authorized by a majority of the ratepayers present at such meeting to make such application: Provided always, that the mayor of the borough shall be the chairman of such meeting, and the voting at such meeting shall be according to the principle established by the Acts of the 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, for the regulation of vestries."

Sect. 68. "That the council may agree with the owners of any lands within the borough for the absolute purchase thereof for any of the purposes of this Act." . . . .

Sect. 69, after reciting that plans of certain works intended to be executed for the improvement of the borough by

of which to raise a borough fund under the 92nd section. Hence they were compelled to make a borough rate, under the same section. But before the charter there had existed in—1, the parish of *Birmingham*, 2, the parish of *Edgbaston*, and 3, certain

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making new approaches to the town hall, making new streets, and by altering and enlarging existing streets, and a book of reference thereto, had been deposited as therein mentioned, it was enacted, "that it shall be lawful for the council to execute the last-mentioned works in the line or course, and upon the lands, delineated on the said plans, and described in the said book of reference, and in Schedule A. to this Act annexed; and it shall be lawful for the council to enter upon, take, and use such of the said lands as shall be necessary for the same works."

Sect. 126. "That the expenses of and connected with the works hereinbefore authorized to be executed for the improvement of the borough, by the making new approaches to the town hall, by making new streets, and by enlarging and altering the existing streets, including the sums required for paying all principal and interest moneys which may be borrowed by the council for the last-mentioned purposes, shall be defrayed by a rate, to be called the 'Street Improvement Rate,' which the council is hereby authorized and empowered to levy upon the occupiers or owners of all buildings and lands within the borough, except as hereinafter is excepted: Provided always, that such rate do not exceed in any one year the sum of sixpence in the pound on the annual value of such buildings and lands."

Sect. 127. "That, except where it is otherwise provided by this Act, all the other expenses of carrying this Act into execution, including the sums required for paying all principal and interest moneys which may be borrowed by the council under the authority of this Act, otherwise than on the security of the said 'Street Improvement Rate,' shall be defrayed by a rate, to be called the 'Borough Improvement Rate,' which the council is hereby authorized and empowered to levy upon the occupiers or owners of all buildings and lands within the borough, in the manner hereinafter provided: Provided always, that such rate do not exceed in any one year the sum of two shillings in the pound on the annual value of such buildings and lands."

Sect. 129. "Provided always, that no person occupying any farmhouse, or buildings connected or occupied therewith, or any lands used as arable, meadow, or pasture ground only, or as woodlands, or market-gardens, garden allotments, or nursery-grounds; and no person entitled to any tithes, corn-rent in lieu of tithes, or tithe commutation rent-charge, shall be liable to be assessed in respect of the same to the street improvement rate; and that such persons shall be liable to be assessed to the other rates authorized to be levied by this Act at one-fourth part only of the net annual value: Provided also, that the occupiers of any land covered with water, or used only as a canal, or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one-fourth part only of the net annual value."

Sect. 130 provides for the making of a new valuation, and concludes thus:—

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hamlets in the parish of *Aston* (all of which were now included in the municipal borough of *Birmingham*) several local Acts. In the parish of *Birmingham* there were commissioners for improving the streets, who possessed various property, comprising the town hall,

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"Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities according to which the property of the *Company of Proprietors of the Worcester and Birmingham Canal Navigation*, and of the *Company of Proprietors of the Warwick and Birmingham Canal Navigation*, respectively, is now rateable, under or by virtue of any special Act of Parliament, and any property of either of the said companies which shall have been exempted by any special Act from any rate, shall continue so exempt."

Sect. 141. "That it shall be lawful for the council from time to time to take up and borrow on the mortgage of the street improvement rate hereinbefore authorized to be levied, any sum or sums of money, not exceeding in the whole the sum of £100,000, for the purposes for which the said street improvement rate is applicable; and to take up and borrow on mortgage of any of the other rates to be levied under the powers of this Act, except the water rate, or by mortgage of the lands, properties, rents, and revenues of the mayor, aldermen, and burgesses, or otherwise as the council shall approve, any sum or sums of money, not exceeding in the whole the sum of £150,000, for all or any of the other purposes of this Act." . . .

Sect. 163. "That nothing herein contained shall be held to alter any of the powers, privileges, and authorities vested in the mayor, aldermen, and burgesses, by or in pursuance of any of the Acts of Parliament now in force, or which may be hereafter passed, in relation to municipal corporations, or by or in pursuance of the said recited charter of incorporation; and, except so far as is herein otherwise provided, the said powers, privileges, and authorities, shall extend and apply to the objects and purposes of this Act, and may be exercised in the execution of, or otherwise in relation to, such purposes."

On the 15th of May, 1860, the *Municipal Corporation Mortgages Act*, 1860 (23 Vict. c. 16), was passed; and, by sect. 8 of that Act, it is enacted, that, "in every case in which the council of any city or borough in *England*, the body corporate of which has not power to purchase or acquire land and hereditaments, or to hold land in mortmain, deem it expedient to purchase or otherwise acquire for public purposes any hereditaments, such council shall represent the circumstances of the case to the Commissioners of Her Majesty's Treasury; and it shall be lawful for such council, with the approbation of the said commissioners, to purchase or acquire any hereditaments, in such manner and on such terms and conditions as may have been approved of by the said commissioners; and such hereditaments may be conveyed to and holden by the body corporate of such borough accordingly; and, in any such case as aforesaid, and also in any other case where the said commissioners are satisfied, upon representation of the circumstances, that all or any part of the purchase-money of any hereditaments proposed to be purchased for public purposes by the council of a borough should be raised by mortgage or charge as hereinafter mentioned, the

a public office consisting of a police court, a prison, and a council room, &c., and who had power to levy rates. The other two districts above named also had similar commissioners, with like powers, and by the *Birmingham Improvement Act* of 1851, the council may, with the approbation of the commissioners, charge and make liable, by way of mortgage or otherwise, the hereditaments so to be purchased, or any other hereditaments of the body corporate, or the borough fund, or borough rates of the borough, or all or any of the securities aforesaid, with the payment of any money necessary for effecting such purchase and interest; and the provisions hereinbefore contained, with reference to the approval of mortgagees, shall be applicable in the case as well of charge on the borough rates or borough fund as of mortgages under this provision, provided that notice of the intention of the council to make such application shall be given, and a copy of the memorial intended to be sent be open to inspection, as by law required in the case of a like application in relation to a disposition of hereditaments."

Sect. 13. "Provided always, that nothing in this Act shall repeal, abridge, or affect any power or authority of any body corporate or the council of any borough, under any local Act of Parliament relating to such body corporate or borough."

The *Birmingham Improvement Act*, 1861 (24 & 25 Vict. c. ccvi.), was passed to amend the *Improvement Act* of 1851, and for other purposes. It recited that it was "expedient that some of such powers" (those comprised in the Act of 1851) "should be amended, and that further provision should be made with reference to the matters aforesaid" (the purposes of the Act of 1851).

By sect. 2, the provisions of the Act of 1851, not thereby repealed or altered, were to extend to that present Act, and the two Acts were to be read together as one.

Sect. 4 gave powers to the town council of taking all or any part of the lands delineated on certain deposited plans which might be required to be taken for the aforesaid purposes; and the works themselves were described in sect. 6 (which did not comprise the present purchase in *Bull Street*).

Sect. 78 was as follows:—"The expenses of, and connected with, the works hereinbefore authorized to be executed for the improvement of the borough by making of new streets, and also all expenses of, and connected with, widening, altering, enlarging, and improving the existing streets, ... whether under the powers of the recited Act (1851), or of this Act, including the sums required for paying all principal moneys and interest which may be borrowed by the council for the purposes of such works, shall be included in the expenses and sums for which the street improvement rate is, under or by virtue of the recited Act, authorized to be levied, and shall be defrayed out of such street improvement rate."

Sect. 79. "Except where otherwise provided by this Act, all the other expenses of carrying this Act into execution, including the expenses of, or in anywise incident to, the preparation and passing of this Act, and all sums required for paying all principal moneys and interest which may be borrowed by the council under the authority of this Act, otherwise than on the security of the said street improvement rate, shall be included in the expenses and sums

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property and powers of these three sets of commissioners were transferred to the corporation. By the 63rd section it was enacted that the principle of voting should be that declared by *Sturges Bourne's Act*. By sect. 126, moneys to be raised for the purposes of the Act were to be defrayed out of a new rate to be called the "Street Improvement Rate," which was not to exceed 6*d*. in the £1. By sect. 127, all other expenses were to be defrayed out of a new rate, to be called the "Borough Improvement Rate," which was limited to 2*s*. in the £1, the old borough rate being unlimited in amount. Sect. 129 exempted from the "street improvement rate" the owners of arable, pasture, or wood land, and market gardens, and partially exempted the same persons from the other rates authorized to be levied by the Act. It also partially exempted

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for which the borough improvement rate is, under or by virtue of the recited Act, authorized to be levied, and shall be defrayed by the council out of such borough improvement rate.

Sect. 85. "In addition to the sums which the council is authorized to borrow under or by virtue of the recited Act, the council may from time to time borrow the further sums following (that is to say):

"First, upon mortgage of the said street improvement rate, such further sum or sums of money, not exceeding in the whole the sum of £50,000, as the council may think proper, for the purposes for which the said street improvement rate is applicable:

"Secondly, upon mortgage of any of the other rates to be levied under the powers of the recited Act, and of this Act (except the water rate), or upon mortgage of the lands, properties, rents, and revenues of the mayor, aldermen, and burgesses of the borough, all such sums of money as may be necessary for paying off all or any of the bonds, debts, mortgages, annuities, moneys, and securities for money, respectively specified or mentioned, or referred to in the 7th section of the recited Act, and hereinafter referred to as the 'commissioners' bonds,' which sums so to be raised as last aforesaid shall be accordingly applied in the payment of the moneys due upon the commissioners' bonds, in such manner as the council shall think fit:

"Third, upon mortgage of all or any of the rates to be levied under the powers of the recited Act and of this Act (other than and except the water rate, and the street improvement rate), or upon mortgage of the lands, properties, rents, and revenues of the said mayor, aldermen, and burgesses, or otherwise as the council shall approve, such further sum or sums of money, not exceeding in the whole the sum of £150,000, as the council shall from time to time think fit, for the purposes of the sewerage, foot-pavement, and other permanent structural works to be made under the provisions of the recited Act, and of this Act" . . . .

By sect. 86, all moneys borrowed under the authority of the Act for the purposes of "sewerage, foot-pavement, and other structural works," were to be appropriated to those purposes, in the proportions therein stated.

railway and canal companies from all the rates authorized to be levied by the Act. The borrowing powers of the Act were regulated by sect. 141, which empowers the council to raise for the purposes of the Act £100,000 upon the "street improvement fund," and £150,000 upon the other rates to be levied under that Act (except the water rate), or by mortgage of lands, &c. Sect. 163 saves the rights of the corporation.

In 1855 the town council proposed to go to Parliament to increase the borough improvement rate from 2*s.* to 3*s.* in the £1, but at a meeting of ratepayers the proposal was rejected by 3425 votes to 171.

On the 27th of November, 1860, when the council were about to go to Parliament for their Act of 1861, they passed a resolution that the committee of the town council be ordered not to consent to any clause that should increase the rating power of the council, nor to allow the removal of clause 63 of the Act of 1851.

On the 5th of December, 1860, at a meeting of ratepayers, the increased borrowing powers contained in the then intended Act of 1861, were on the faith (as the information alleged) of the above resolution, assented to, after considerable opposition.

In 1861 the second Improvement Act was passed. By the 78th section the expenses of the works therein authorized to be executed for the improvement of the borough by the making of new streets, and also the expenses of widening, altering, enlarging, and improving the existing streets, were included in the expenses for which the street improvement rate was authorized to be levied; and by sect. 79 "all other expenses" of carrying the Act into execution were to be included in the sums for which the borough improvement rate was applicable. Sect. 85 gave additional borrowing powers to the extent of £50,000 for the purposes to which the street improvement rate was applicable, and also to borrow upon mortgage of the other rates to be levied under the powers of the Act a further sum of £150,000. Sect. 86 defined the specific appropriation of the moneys to be raised for the purposes of the works therein described.

Previously to the Act of 1861 was passed the *Municipal Corporation Mortgages Act*, 1860, whereby councils of boroughs (not having power to hold in mortmain), upon representation to the

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Treasury, after notice given, are empowered to purchase and hold land, and also to mortgage land; and sect. 13 saves the existing rights of bodies corporate and borough councils under local Acts.

The rateable value of the property in *Birmingham* liable to be rated to the street improvement rate, was £973,000; and that of the property liable to be rated to the borough improvement rate was £1,005,000; the former rate would produce about £18,300 a year, the latter about £74,100.

It appeared that on the 7th of March, 1865, the Council of the borough passed a resolution authorizing their finance rate and appeal committee, to adopt all necessary proceedings for obtaining the sanction of the Treasury to the purchase of the property in *Bull Street*, and the raising of the purchase-money on security of the borough rate; that notices of such intended application having been given, memorials against the application were presented by the guardians and overseers of the poor of the parish, by the *London and North Western Railway Company*, by the *Birmingham Canal Company*, and by several ratepayers, alleging that this mode of raising the purchase-money was illegal.

Upon this the Commissioners of the Treasury sent Mr. *Robert Rawlinson* to *Birmingham* to hold a public inquiry on the statements contained in the memorials, the result of which was a report by that gentleman to Sir *G. Grey*, dated the 25th of April, 1866, wherein he stated the legal question, and that the powers of the *Corporation Mortgages Act*, 1860, had been previously used in *Birmingham*, and recommended that the entire case should be submitted to some legal authority. On the 14th of June, the Commissioners of the Treasury communicated their decision to the guardians and overseers, stating that they declined to express any opinion on the points of law, and did not feel themselves called upon to submit the question to a legal authority, but, adverting to a statement in the report that there was no dispute at the inquiry as to the great utility of the proposed improvements, and as to the several instances in which the corporation had availed themselves, with the consent of the board, of the powers of the *Municipal Corporation Mortgages Act*, 1860, their Lordships did not consider they should be justified in withholding their con-

sent to the arrangement; and that they had accordingly conveyed to the town council their approval of the loan of £2700 being contracted on the security of the borough rate. A similar communication was made to the corporation.

The informants alleged (par 14) that the corporation had made the purchase under the powers vested in them by the Improvement Acts for the purpose of improving the line of the street; and charged that under the Improvement Acts, especially under sect. 78 of the Act of 1861, the £2700 ought to have been paid out of the street improvement rate, and not out of the borough fund: and if raised by mortgage, ought to be raised by a mortgage of the former and not of the latter fund. They alleged (par. 20) that the council *had paid* the £2700 out of the street improvement rate, or out of a capital produced thereby, and were now seeking to borrow the same amount upon mortgage of the borough fund. They alleged that the council had not exhausted their powers under the Improvement Acts of 1851 and 1861 of borrowing on the security of the street improvement rate, inasmuch as £35,000 of the authorized amount was still unborrowed; and that the current annual proceeds of the rate at 6*d.* in the £1 would be sufficient to pay the amount. They charged that the effect of borrowing the £2700 upon the mortgage of the borough fund would be, to throw the burden of payment upon all the occupiers and owners throughout the borough rated to the poor, and to deprive such of them as were exempted by the Improvement Acts from the street improvement rate of the benefit of such exemption: also, that the effect of raising the £2700 upon the security of the borough fund would be, to cause many persons to contribute to it who were not liable, and others who were liable, but entitled to allowances, to be deprived of the benefit of such allowances.

To this bill all the Defendants demurred.

Mr. *Toulmin Smith*, and Mr. *Fry* (with them Sir *Roundell Palmer*, Q.C.), for the demurrer:—

The information is based on two grounds—one, that we are attempting to exceed the powers given to us by the 63rd section of the Act of 1861, in raising money by means of the borough fund, without the sanction of a public meeting held as therein

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prescribed; and the other—that we are attempting to exercise powers given by the Act of 1860, in breach of faith with the rate-payers, who consented to the passing of the bill of 1861, only on the terms that the town council should have no further powers of rating.

But our contention is, that the *Corporation Mortgages Act* of 1860 is a general Act, the provisions of which are paramount to those of all local Acts, and supersede all resolutions. The Improvement Acts of 1851 and 1861 are strictly local Acts, confined to certain definite purposes described in the Acts (of which the present purchase is not one)—and necessarily so, inasmuch as local improvement Acts are never brought before Parliament except upon given estimates, which may, and generally do, in the course of time, prove insufficient. The Act of 1861 was passed in order to provide the further sewerage works which became necessary in consequence of the injunction of this Court, upon Mr. *Adderley's* Information, in 1858: *Attorney-General* v. *Borough of Birmingham* (1). It was passed for specific works, clear in view and proof before the committee of both Houses of Parliament, and the borrowing powers in sect. 78 were limited to meet the special purposes comprised in sect. 69 and other parts of the Act of 1851, and in sect. 6 of the Act of 1861, and no others.

Having complied with the provisions of the *Mortgages Act* of 1860, we therefore say we are authorized to make this purchase under sect. 8.

If this information succeeds, we shall be compelled, whenever further works become necessary, to go to Parliament from time to time for fresh local Acts. This purchase is an example of a need which has grown up since the Acts of 1851 and 1861: and it is an obvious case for the application of that subsidiary aid which we say we get from the Act of 1860.

Neither the railway nor the canal companies are Relators on this information.

Mr. *Rawlinson*, the commissioner, states that the powers of the Act of 1860 have been exercised already; and the public utility of this purchase is not disputed.

As a matter of fact, we have not paid the purchase-money out

(1) 4 K. & J. 528.

of the street improvement fund: we have merely paid it out of cash at our bankers.

The allegation that the powers of borrowing on the security of the street improvement rate are not exhausted does not help the Relators. If the purposes of the Acts of 1851 and 1861 are still unfulfilled, the surplus of £35,000 must be appropriated to meet them; the present transaction being, we say, not one of them.

There is an adequate remedy at law by appealing against the rate.

If the prayer be granted, the effect will be to repeal not only the *Corporation Mortgages Act*, but the *Local Government Act*, 1858, the *Sewage Utilization Act* of 1865, the *Free Libraries Act*, the *Baths and Washhouses Act*, and many others.

We further say that, not only under the Act of 1860, but also under that of 1861, may this money be raised out of the borough fund. We admit that the 63rd section of the Act of 1851, upon which the Relators rely, is re-enacted by the Act of 1861, and must be read as if passed subsequently to the Act of 1860. But it is a sufficient answer to this information to say we are not attempting to proceed under the 63rd section. All the 63rd section means is, that the council shall not, at the expense of the borough rate, make any application to Parliament to extend their powers without the consent of their constituents. For example, they are not to exceed the estimates of any specified work for which estimates have been furnished. All doubt upon the subject is removed by the 163rd section of the Act of 1851, which may now also be said to be subsequent to the Act of 1860, and to what can the 163rd section more appropriately extend than to the 8th section of the Act of 1860, under which we are now acting? The 163rd section gives us cumulative powers, in addition to those conferred by the local Acts. The 78th and 79th sections of the Act of 1861 relate only to the distribution of the expenses thereby authorized to be incurred; but even if it should be held that they go further, they do not *prevent* the exercise by the corporation of the power under the Act of 1860.

The information alleges (par. 14) that we have purchased under the powers of the Improvement Acts for the purpose of improving the line of the street. Taking it so, we have purchased for one

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of the purposes of the Act of 1851, but not one of the purposes mentioned in the schedule. And the expenses referred to in sections 126 and 127 of the Act of 1851 relate (as appears from sect. 69) solely to the works mentioned in the schedule, of which this is not one. The power of borrowing for works not scheduled is to be found in sect. 141, which is perfectly general in its terms. Hence the council is entitled to raise this sum by mortgage of any part of the corporation property.

Mr. *G. M. Giffard*, Q.C., and Mr. *Speed*, for the information:—

The last argument on the other side may be disposed of by remembering that the information is to restrain the corporation from borrowing out of the borough rate. It does not seek to restrain their borrowing out of anything else, or by other means.

The borough fund created by the 92nd section of the *Municipal Corporations Act*, is to be raised in case of a deficiency in the borough rate. But the borough rate, unless it were raised from borough property, of which, *ex concessis*, *Birmingham*, until after the Act of 1851, had none, could only be raised for the purposes specified in the Act. It cannot be said that the 92nd section gave power to the council to raise money out of the borough fund for street improvements. The 94th section, in like manner, applied merely to cases where a corporation was already possessed of property.

Then came the Act of 1851, whereby the property and powers of the several local commissioners were vested in the corporation, solely, as we say, for the purposes specified in the Act of 1851, and not for the purposes specified in the *Municipal Corporations Act*. By sect. 7, all debts of the commissioners are to be paid by the corporation. But out of what fund? Not out of the borough rate, nor out of other funds of the corporation, but out of the same funds as were liable to pay the same debts in the hands of the commissioners.

It is a violent construction of the 141st section to say that the words, "the lands, properties, rents, and revenues" of the corporation can extend to the borough rate.

There is nothing in the 163rd section which justifies the application of the borough fund to this purpose, for it must be remem-

bered that, prior to 1851, the borough had no property vested in them.

One of the express purposes of the Act of 1851 is that of street improvements, and there is a very obvious reason why railway and canal companies, and others, whilst they contribute to the poor rate, should not pay for widening a street.

By the 13th section of the Act of 1860 existing powers are not to be either repealed, abridged, or affected. Would not the making a borough rate for the purpose of street improvement be an "affecting" of the former power?

The 8th clause of the Act of 1860, in the earlier part, applies only to bodies which have not power to hold in mortmain, and therefore not to this corporation; and "public purposes" is a very vague phrase. It has been repeatedly held that general words in an Act of Parliament have been, by construction, cut down to meet the particular case: *Hawkins* v. *Gathercole* (1).

Following that decision, where general powers are given to a corporation, as here, and where a particular purpose is provided for by special powers, those special powers must be exercised, and none other. There are plenty of other corporations to which the general words would be applicable.

The Act of 1861 would never have been passed if it had been supposed that the Act of 1860 was open to the construction now attempted to be put upon it. Such a construction is contradicted by the recitals of the Act of 1861. There is nothing in the 72nd or 79th clause to justify the raising of this sum out of the borough rate.

Even if the Defendants are right in their construction, the demurrer must be overruled. They contend that sect. 8 of the Act of 1860 gives a new and cumulative power. But then they must admit that sect. 8 only applies to cases of *intended* purchase, not to what they propose to do, namely, having already purchased, to recoup the street improvement fund by a borough rate. They have already exercised their power under the Act of 1851, and now seek to act again under the Act of 1860. It must be assumed (par. 20) as a fact that they have paid this £2700 without the consent of the Treasury, out of the street improvement fund, as

(1) 6 D. M. & G. 1. 1 Jur. N.S. 481.

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they are entitled to do, and they cannot now charge it upon the borough rate.

A general statute will not repeal a prior statute, unless it be of necessity that it should have that effect: *Dwarris* on Statutes (1).

SIR W. PAGE WOOD, V.C. (after stating the question, continued):—

I may dispose of the allegation contained in paragraph 20 of the bill at once, by saying that it is not an allegation that the property has been purchased and has been actually paid for before the approbation of the Lords of the Treasury was obtained; it is only an averment which follows the narrative of the application to the Lords of the Treasury. That application stated that a contract had been made, but not that money had been paid, and it asked the sanction of the Treasury both to what had been already done, and to the proposal to raise the intended purchase-money by a charge on the borough rate. The information says that the Defendants have paid the money out of other funds, which they have under their control by the Acts of 1851 and 1861, and having done that, they now seek to raise the money in the way proposed, pretending that they are authorized to do so by the Treasury. I apprehend, that if the property had not been already purchased, and already paid for, the application for leave to raise the money by means of a charge upon the borough rate would have been granted. So that it is of no consequence whatever, that the corporation have other funds at their disposal. I do not, therefore, think that the circumstance alleged in paragraph 20 makes any substantial difference in the case.

I have then to consider how far the general Act of 1860, which undoubtedly gave the corporation authority to do what they have done, is affected by the Acts of 1851 and 1861, or either of them.

Now it is plain that the Act of 1851—and I might almost dispose of the Act of 1861 at the same time, because it is only a repetition of the former Act, with more enlarged objects—proposes that there shall be two things done with which this information is specially

(1) Page 532.

concerned. A large amount of property, vested in commissioners, is transferred to the corporation, in order that they may become trustees for the same purposes for which the commissioners were originally appointed; one of those purposes being sewerage, and the other, the effecting of large improvements in streets. The schedule to the Act of 1851 mentions a great deal which is to be done in the way of improving streets. The statute specifies other improvements, and it constitutes two funds, one to be called the "Street Improvement Fund;" and the other, the "Borough Improvement Fund." That being so, the corporation are empowered *ex mero motu*, and in their own judgment, unfettered by any consent of the Treasury, or otherwise, to carry into effect these improvements; and for that purpose to make one of the rates above mentioned for street improvements, and the other for borough improvements. These rates are both of them peculiar in their character. They are limited in area, and limited in amount. The street improvement rate, for example, is confined to 6*d.* in the £1, and the power of borrowing is confined to £100,000. It is limited, also, in area, inasmuch as there are numerous exemptions which are not made in the case of an ordinary borough rate or poor rate. Then the purposes to which it is to be applied are defined; and similar provisions are made with regard to the other. That also is limited as to the amount, limited as to the power of borrowing, and limited in area. The Acts of 1851 and 1861 both contain sections by which the appropriation of the funds is carried into effect. They say that all the expenses of making new streets, and of widening and improving the existing ones, are to be taken out of the street improvement rate; and that the other expenses of carrying the Act into execution, are to be defrayed by the borough improvement rate. That is to say, the two funds are not to be mixed, but each is to be devoted to its appropriate purpose. Then it appears, although it was not insisted upon in argument by either side, that there is a section (63) which enacts that no application shall be made to Parliament for further powers without notices having been given, meetings held, and votes taken, according to Mr. *Sturges Bourne's Act*, as it is called. But that, of course, has no bearing on the interpretation which I must give to the Act of 1860. The only effect of that section, as Mr. *Fry*

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observed, would be, that clauses would have to be prepared, to be laid before the committee of either House, analogous to the *Wharncliffe* Order, and proceedings would have to be stayed until the House was satisfied that the section had been complied with. Then there is the 163rd section, which says, that all powers contained in any Act now in force, or in any future Act, shall be confirmed, and the mayor and corporation shall have unaltered all the powers, privileges, and authorities, which were then or might thereafter be vested in them. I do not think that this clause has any important bearing on what follows.

Between the Act of 1851 and the Act of 1861, the Act of 1860 is passed; and I have to consider what is the effect of that general Act of 1860 upon the local Act of 1851. As regards the Act of 1851, the argument that the corporation ought not to be allowed to do what they are doing is founded on the 13th section of the public Act of 1860. [His Honour read the words.] The effect of that enactment, as applied to this particular case, is simply this, the Legislature says: "Whereas we are passing an Act whereby we authorize any municipal corporation, with the consent of the Lords of the Treasury, and after certain notices given, to purchase land; and whereas there are local Acts which give other powers, nothing in this Act shall 'repeal, abridge, or affect,' any such power or authority." Mr. *Giffard's* argument was, that the word "affect" must be read "enlarge." I do not think it would make a very considerable difference if it had been so; but, in my opinion, that is not the necessary reading of the words. The clause means what it says, that existing powers, to the extent to which they are not abridged or repealed by express words, shall remain unabridged and unrepealed. The corporation is not to be subject to any control by commissioners or the like.

It is said, however, that this could not have been intended by the Act, when we look at the 8th, which is the enabling section, and which says distinctly, that in any case where a corporation not having power to purchase or acquire land and hereditaments, or to hold land in mortmain, deem it expedient to purchase, they may do so; and then says, that *in that, or any other case*, the Lords of the Treasury shall say whether the purchase is for public purposes, and after certain notices have been given of the application,

it shall be lawful for them to give leave that the money necessary for the purpose of effecting the purchase shall be raised by a mortgage on the borough rates. No doubt it is open to argument, that the Act of 1860, in its provisions, is so inconsistent with, and repugnant to, the Act of 1851, that the two Acts cannot be read together, that it is impossible to suppose that the Legislature contemplated any such change of operation as would be indicated by the Act of 1860, where the local Act of 1851 had prescribed what was to be done. The Act of 1851 says that the corporation may purchase houses whenever they think fit; and may, of their own authority, levy a rate, but a rate limited in amount, area, and extent. Then it is argued,—can it be meant by the Act of 1860 that they shall have power to levy a rate unlimited in amount, unlimited in area, and unlimited in the extent of its charging power? If that were the simple purpose of the Act of 1860, it would afford a very strong reason for exempting the corporation of *Birmingham* from the Act of 1860, and the privileges thereby conferred. But what inconsistency is there in the Legislature, in the former Act, saying, the corporation may, for a particular purpose, and of its own authority, levy rates in a limited manner, and it also may, by the later Act, with the sanction of a body paramount to itself, and after everybody has been duly heard, have an opportunity of raising, for the benefit of the whole community, something more, in a different way, and with different incidents as to the limits both of the persons taxable, and of the amount to be raised? It seems to me there is no inconsistency in that.

[His Honour commented on the remaining facts, and continued:—]

If I were to accede to the argument on behalf of the Informants, I should be excluding from the wider provisions of the general Act of 1860, every corporation that has the misfortune of possessing a local Act; and on similar grounds, the numerous Acts to which Mr. *Toulmin Smith* referred would equally render inapplicable the Act of 1860, if any larger sum or any larger powers are required. If I were to hold that none of the purposes of these Acts can be effected on a more extended scale by reason of the Act of 1860, it appears to me I should be depriving a large proportion of the municipal corporations of this realm of the resources they have a

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right to look to for the improvements of the districts under their charge.

Then it is said that the Act of 1861, coming after the Act of 1860 was passed, repeats the provisions of the Act of 1851. That seems to me to shew, *à fortiori*, that the Legislature did not intend to abrogate the provisions of the Act of 1860, because otherwise it would have been easy to have said—as regards proceedings under this Act of 1861, or the Act of 1851 incorporated herewith, the Act of 1860 shall have no application.

I do not find any averment in the bill to the effect that the fund which has been raised is adequate to all the purposes of the Acts, either of 1851 or 1861, or that all, or most all, the works have been done; but I do find this averred, that they have not exercised all their charging powers, and that they may yet charge a sum of £35,000. But that does not seem to me to make any substantial difference.

Moreover, when it is said that in the former Act there are persons specially exempted from this borough rate, such as owners of market gardens, and railway and canal companies, I assume that that matter, like all the rest, must have been brought to the attention of the Lords of the Treasury, and they very probably have considered that a railway company or a market gardener has a considerable interest in having the streets of a town along which they have frequently to have goods conveyed, in the best possible state for such conveyance. The Lords of the Treasury may have thought, after they had heard everybody on the subject, that it was right and reasonable that this Act should be put in force. I, for my part, do not see any hardship or injustice arising from it; or that the Act of 1860 is inconsistent with the Acts of 1851 and 1861, or with their special objects.

I must, therefore, allow this demurrer.

Solicitors for the Informants: Mr. *Joseph Ivimey*, agent for *Edwin Wright, Birmingham.*

Solicitors for the Respondents: Messrs. *Dale & Stretton*, agents for *Thomas Standbridge, Birmingham.*

WHEELER *v.* TOOTEL.

V.-C. M.
1867
Jan. 25.

Apportionment of Rents—4 & 5 *Will.* 4, *c.* 22—"*Let into Possession.*"

A testator gave the residue of his real and personal estate to trustees, upon trust to receive and accumulate the rents and profits till his nephew should attain twenty-one, when he was to be put into possession of the estate for his life:—

Held, that there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one.

St. Aubyn v. *St. Aubyn* (1) followed.

HENRY BELWARD RAY, by his will, dated the 19th of February, 1856, gave the residue of his property, real and personal, to trustees, upon the following trust: "To receive the rents and profits, and to accumulate the same until my nephew, *Herbert Wheeler*, shall attain the age of twenty-one years, when he is to be put into possession of the same for his life, and after his death the same is to pass to his sons in tail male;" and in case *Herbert Wheeler* died without male heirs, then the testator gave the rents and profits on the same conditions to three other nephews in succession, and their heirs male, with remainder to his own right heirs.

By a codicil to his will, dated the 29th of March, 1856, the testator, after making a direction as to the management of his estates, continued in these words: "I desire that in stating that I wish the rents and profits of such estates as I may have settled upon any of my nephews on his coming of age, shall accumulate and be considered as part of my capital, and the rents and profits only to be paid to such nephew on his attaining his majority; I desire that my trustees shall have the power of making such allowance to my said nephew during his minority as they may think proper."

The testator died on the 31st of March, 1856. *Robert Wheeler* attained the age of twenty-one in October, 1866, and now presented his Petition in a suit instituted for the administration of the testator's estate, to be let into possession of the real and personal property, with other consequential directions.

(1) 1 Dr. & Sm. 611.

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It was also asked that the title deeds might be delivered up to the Petitioner as tenant for life of the estates.

The only question discussed was, whether there should be an apportionment under the 4 & 5 Will. 4, c. 22, of the rents and profits up to the period at which the Petitioner became entitled to be let into possession. The personal property amounted to about £100,000, and the real estates were of considerable value.

Mr. *Baily*, Q.C., and Mr. *Watson*, in support of the Petition :—

In this case there can be no apportionment of the rents and profits. The testator has directed that his nephew is to be put into possession upon attaining twenty-one. The trustees, therefore, are bound to put him into possession, and it is for him to receive the rents after that period, and not the trustees. Consequently the only means by which they can obtain an apportionment is by the tenant for life paying back a certain portion of the first rent which he receives to the trustees. The interest of the trustees ceases on the day when the tenant for life attains twenty-one, and they have no longer any power to receive the rents. It never could have been the intention of the testator that those rents which the trustees had no power to receive should be accumulated by them, and the case does not come within the *Apportionment Act*.

Mr. *Martelli*, for the Defendant, *Alfred L. Wheeler*, who was entitled to the accumulations upon the death of the tenant for life :—

There are three cases in which this question has arisen, upon words very similar to the present. In *Shipperdson* v. *Tower* (1), Lord Justice *Knight Bruce*, when Vice-Chancellor, decided in favour of an apportionment. In *Campbell* v. *Campbell* (2), the Master of the Rolls decided that the *Apportionment Act* did not apply ; and in *St. Aubyn* v. *St. Aubyn* (3) Vice-Chancellor *Kindersley* held that there must be an apportionment. There are consequently two authorities for, and one against, apportionment ; and in the most recent case the Vice-Chancellor had the other two before him when he came to his decision.

(1) 8 Jur. 485. (2) 7 Beav. 482. (3) 1 Dr. & Sm. 611.

Mr. *Dickinson*, Q.C., and Mr. *Methold*, for the trustees, Messrs. *Tootel* and *Wynne*.

Mr. *Baily*, in reply.

SIR R. MALINS, V.C.:—

If this question had been unfettered by authority, I should have come to the conclusion that there was no apportionment. The testator has directed that, upon his nephew attaining twenty-one, he is to be put into possession of the rents and profits, and I think there can be no doubt that, if he had been asked the question whether he intended the nephew to have such rents and profits as arose after his attaining twenty-one, he would have answered in the affirmative; but the matter is not unfettered by authority. The point has been decided in three cases. The first is *Shipperdson* v. *Tower* (1), a decision of Lord Justice *Knight Bruce*, when Vice-Chancellor; the second is *Campbell* v. *Campbell* (2), decided by the Master of the Rolls; and the third is *St. Aubyn* v. *St. Aubyn* (3), before Vice-Chancellor *Kindersley*, where the decision was, that the tenant for life, who was entitled after the expiration of a term in trustees to accumulate rents, was not entitled to the whole of the rents which became payable after that period, but there was to be an apportionment. I am unable to distinguish this case from *St. Aubyn* v. *St. Aubyn*. The trustees represent those persons who are entitled to the accumulated fund. They have an interest which determined upon the Petitioner attaining twenty-one. From that period another interest commences. As the question is concluded by authority, I cannot come to any contrary decision. Although it is clear that eminent Judges have differed in their opinions, yet there being two cases in favour of apportionment, including the most recent case, I must follow those authorities, and decide that there is to be an apportionment of all such property as comes within the Act.

As to the custody of the deeds, I think that the Petitioner, who is the tenant for life, and has the legal estate, is entitled to their custody.

Solicitors for the Petitioner: Messrs. *Wilde, Humphrey, & Wilde.*
Solicitor for the Trustees: Mr. *Wynne.*

(1) 8 Jur. 485. (2) 7 Beav. 482. (3) 1 Dr. & Sm. 611.

V.-C. M.
1867
Jan. 24.

TULLOCH *v.* TULLOCH.

Practice—Chancery Amendment Act, 15 & 16 *Vict. c.* 86, *s.* 55—*Sale before Decree.*

2 Ch. D. 411.

The Court has power, under the 55th section of the *Chancery Amendment Act*, to order a sale before the hearing of a suit, where it is for the protection or benefit of the estate.

THIS was a motion, under the 55th section of the 15 & 16 Vict. c. 86, on behalf of the Plaintiffs, that a freehold house mentioned in the will of General *Tulloch*, the testator in the suit, might be sold by order of the Court.

The testator, by his will, dated the 17th day of February, 1862, devised and bequeathed his freehold house in *Dawson Place, Bayswater*, and other property, to trustees, upon trust to permit his wife to occupy the house during her life, and after her decease to sell the said messuage and premises in such manner as they should think fit, and apply the proceeds, after payment of debts, in manner therein directed, for the benefit of his children, and their issue.

The testator's widow died on the 23rd of November, 1866.

This bill was filed on the 4th of December, 1866, on behalf of infants taking a benefit under the will, by their next friend, for the administration of the testator's estate.

The evidence in support of the motion went to shew that the house in *Dawson Place*, mentioned in the will, had remained unoccupied since the death of the widow; that it was worth about £3000, and that by remaining unoccupied it would deteriorate in value, and would create unnecessary outlay; that it was consequently for the benefit of the estate that it should be sold before the hearing of the cause.

Mr. *Baily*, Q.C., and Mr. *Herbert Smith*, in support of the motion.

Mr. *Fischer*, for the surviving trustee of the will:—

The facts do not warrant an immediate sale, and the Court is not empowered to direct a sale under the 55th section of the Act 15 & 16 Vict. c. 86, before the hearing. The suit is unnecessary, since the trustee might have sold the estate under the powers in

the will which enable the trustees to give receipts for the purchase-money. But, at any rate, as the fund is impressed with the payment of debts, the trustees might have sold under the 47th section of the *Chancery Amendment Act*, under an administration summons, at a much less expense. Since the institution of this suit an administration summons has been taken out at the Rolls, by an incumbrancer upon the property, and an order will be made forthwith. Upon that summons all the objects of this suit will be secured. The trustee is quite willing that a sale should take place, but he is desirous of waiting until the father of the infant Plaintiffs, who is now in *India*, can be communicated with, and his wishes ascertained as to the sale, and also as to the appointment of a guardian to his children.

The suit was instituted with undue haste, since the widow had only been dead eleven days when the bill was filed. In *Prince* v. *Cooper* (1), the Master of the Rolls refused an application of a similar description, and decided that he could not make an order for a sale before the hearing of the suit. The 55th section was intended only for the protection of the property.

Mr. *Baily* stated, that the Defendants' solicitor had refused to assent to the cause being heard as a short cause, otherwise a decree would have been made at once upon the hearing. This motion was rendered necessary by that refusal.

SIR R. MALINS, V.C.:—

I have no intention of departing from the principle laid down in the case of *Prince* v. *Cooper* (1). The decision in that case proceeds on the ground that it was an attempt to obtain a decision of the Court on a material point in a contested suit, upon motion for a sale. In this case an application was made to the Defendants' solicitor to consent to the cause being heard as a short cause. That application was refused, and I can only think it was under some misapprehension as to the proper course to be taken, for then a decree might have been made a fortnight since. The Master of the Rolls, in the case referred to, said the 55th section was applicable only to a case in which, for the protection of the property, or

(1) 16 Beav. 546.

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other like cause, it is necessary to come to the Court. The question here is, whether it is for the protection of the property that the house should now be sold? In my opinion it is so. What I mean by protecting the property is, that a house in the west end of *London*, remaining unoccupied and unproductive, should be converted into money as early as possible, and turned to the most advantage for the infants. As to the bill being filed so soon after the death of the widow, I think where property is situated like this, the proceedings cannot be taken too soon. I cannot say that the course which has been adopted, in instituting these proceedings, is wrong, but if the bill has been improperly filed, there is a proper and usual mode of coming to the Court on that point. As to the administration summons which has been taken out at the Rolls, my opinion is, that where a suit is before one branch of the Court, the commencing proceedings by another process in a second branch of the Court is an act of great impropriety. At any rate, as this suit is clearly before me, I must decide the present application, which I now do by making the order asked.

Solicitor for the Plaintiffs: Mr. *George Smith*.
Solicitors for the Defendants: Messrs. *Farrer & Co.*

V.-C. M. 1867 *Jan.* 17, 18, 19, 21, 22; *Feb.* 9.

In re OVEREND, GURNEY, AND COMPANY. *Ex parte* OAKES AND PEEK.

Company—Winding-up—Contributory—Misrepresentation in Prospectus.

Where the directors of a public company had been guilty of fraudulent concealment and misrepresentation of important facts in their prospectus, and the company was in course of winding up:—

Held, that persons who had been induced to take shares and become members by reason of such concealment or misrepresentation, were not entitled to any relief as against creditors, and motions to have their names removed from the register and list of contributories refused.

THIS case came on upon two motions, one by Mr. *Richard Oakes*, and another by Mr. *William Peek*, that their names might

be removed from the register of members of *Overend, Gurney, & Company, Limited*, and that the said register of members, and list of contributories (if any) might be rectified accordingly, and that no call might be made or enforced against the said *Richard Oakes* and *William Peek*, in respect of any shares alleged to be held by them in the said company, and that all proceedings for enforcing any call in respect of the shares of the said company from the said *Richard Oakes* and *William Peek* might be stayed.

The only difference between the position of Mr. *Oakes* and Mr. *Peek*, was, that Mr. *Oakes* was an original allottee of shares, and Mr. *Peek* had purchased shares in the company after its formation.

The prospectus for the formation of the company was issued on the 12th of July, 1865, and was in the following terms:—

"*Overend, Gurney, and Company, Limited.* (Incorporated under the *Companies Act*, 1862).

"Capital, £5,000,000, in 100,000 shares of £50 each, of which it is not intended to call up more than £15 per share. Deposit on application £2 per share, £6 per share on allotment, £4 per share on the 15th of September, and the same on the 15th of November.

"Directors.—*Henry Edmund Gurney*, Esq., 65, *Lombard Street; John Henry Gurney*, Esq., 9, *St. James's Square*, and *Catton Hall; Robert Birkbeck*, Esq., 65, *Lombard Street, Norwich; Henry Ford Barclay*, Esq., *Monkhams, Woodford, Essex; Thomas A. Gibbs*, Esq. (Messrs. *T. A. Gibbs & Co.*), 72, *Old Broad Street; Harry G. Gordon*, Esq., Chairman of the *Oriental Bank; William Rennie*, Esq. (Messrs. *Cavan, Lubbock, & Co.*), 16, *Leadenhall Street.*

"Bankers.—*Bank of England;* Messrs. *Barclay, Bevan, Tritton, Twells, & Co.*

"Brokers.—Messrs. *Sheppards, Pelly, & Allcard*, 28, *Threadneedle Street.*

"Solicitors.—Messrs. *Young, Jones, Vallings, & Roberts.*

"Offices.—65, *Lombard Street.*

"Temporary Offices for Allotment and the Registration of Shares.—51, *Lombard Street.*

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney, & Co.*, of their long-established business

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as bill brokers and money dealers, and of the premises in which the business is conducted, the consideration for the goodwill being £500,000, one half being paid in cash, and the remainder in shares of the company, with £15 per share credited thereon—terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders. The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred. Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. *Henry Edmund Gurney*, and Mr. *Robert Birkbeck*), will also occupy the position of managing directors, and undertake the general conduct of the business. The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment. The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders. Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company. Applications for shares must be accompanied by the payment of a deposit of £2 per share, which will be received by Messrs. *Barclay, Bevan, Tritton, Twells, & Co.*, 54, *Lombard Street.* In the event of no allotment being made, the deposit will be returned in full. Should a less number of shares be allotted than are applied for, the deposit will, so far as required, be appropriated towards the payment due upon allotment.

"*London*, July 12th, 1865."

The memorandum of association of *Overend, Gurney, & Co., Limited*, was dated the 12th of July, 1865, and it stated, the objects of the company to be "the receiving of money on deposit, or by re-discount of bills, and the employment and invest-

ment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan, and in investing in securities, and generally the carrying on of the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the City of *London*, and, with a view to the above objects, the acquisition of such business, upon terms to be agreed by the directors, and the acquisition, whether by way of purchase or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms as the directors shall think expedient, and the doing of all acts and things incidental or conducive to the attainment of the above objects."

The names of eight persons who had agreed to take the number of shares set opposite to their respective names were appended to the memorandum, viz.: *H. E. Gurney*, 4000 shares; *J. H. Gurney*, 4000 shares; *Robert Birkbeck*, 2000 shares; *S. Gurney Buxton*, 600 shares; *Henry Ford Barclay*, 1000 shares; *William Rennie*, 500 shares; *H. G. Gordon*, 200 shares; and *T. A. Gibbs*, 1000 shares.

The articles of association bore the same date as the memorandum. The only important clauses were to the effect following :—

4. That an application for shares in the company in writing, together with payment of the deposit, followed by an allotment, should be deemed an acceptance of shares within the meaning of the articles; and every person who accepted any share in the company, and whose name was entered in the register, and no other person, should, for the purposes of the articles, be deemed to be a member.

57. That the qualification for a director should be the holding in his own right of 200 shares in the company. *Henry Edmund Gurney*, *John Henry Gurney*, *Robert Birkbeck* (managers of the firm of *Overend, Gurney, & Co.*), and *Henry Ford Barclay*, *Thomas Augustus Gibbs*, *Harry George Gordon*, and *William Rennie*, Esqs., to be the first directors of the company."

58. That *Henry Edmund Gurney* and *Robert Birkbeck* should, whilst they continued directors of the company, be managing directors; and that the managing directors should receive £5000 per annum for their services.

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68. That an annual sum, after the rate of £500 per annum for each director (other than the managing directors), should be allowed out of the funds of the company, as a remuneration for their services, to be divided between them in such proportions as they should determine among themselves.

82. That the business of the company should be conducted by the managing directors, with the assistance of the other directors; that, subject to any special provision in these articles, or in the *Companies Act*, 1862, the directors should exercise all such powers and authorities, and do all such acts, as should be, in their judgment, necessary or expedient for the effective and successful carrying on of the business of the company.

83. That the company, or the directors on their behalf, might, for the purpose of carrying on the general business of the company, purchase, lease, or otherwise acquire, any lands, buildings, or other hereditaments, of freehold, copyhold, or leasehold tenure, situate in *England*, upon such terms and conditions as they should think fit; and particularly they were authorized to contract for, and complete the purchase of, the messuages and hereditaments in *Lombard Street* and *Birchin Lane*, belonging to, and occupied by, Messrs. *Overend, Gurney, & Co.*, at a price to be fixed by valuation in the usual way, and under such stipulations as to title or otherwise as might be agreed upon.

84. The directors were also authorized to purchase or acquire, upon such terms, and under such stipulations as to guarantee or otherwise, as might be agreed upon, the business and goodwill of the said Messrs. *Overend, Gurney, & Co.*, as the same then stood, and any other business of a like character which they might thereafter think it expedient to acquire for the benefit of the company.

85. The consideration for any property, business, or goodwill, to be purchased by the company or the directors, to be paid in money or shares in the company, as might be agreed upon between the vendors and the company or the directors.

The deed of covenant executed upon the transfer of the business of the firm of *Overend, Gurney, & Co.*, to the limited company was dated the 27th of July, 1865, and was made between the partners of the *London* firm of *Overend, Gurney, & Co.*, of the first part, the

partners in the *Norfolk Banking Company* of the second part, and the limited company of the third part:

After certain formal covenants for the sale and purchase of the business "as a going concern," to take effect from midnight on the 31st of July, 1865, at the price of £500,000, it was provided, "that the limited company shall be entitled, so far as the directors shall require, to have the said sum of £500,000 applied and made available by way of material guarantee in aid of the covenants of the vendors therein contained; and that the obligation of the limited company, in respect of the payment or allowance on account of that sum, shall be controlled by the right of the said limited company to have the same so applied and made available; and such obligation shall not be enforced or enforceable by the vendors otherwise than, or except in subordination to, the right of the limited company to have the same so applied and made available:"

Then followed a clause providing for the continuance and carrying on, by the limited company, of all open or unsettled accounts connected with the business, as appearing by the books at the moment of transfer, "except such accounts as the directors of the said limited company shall require to be reserved, or excepted, to be wound up and closed by *Overend, Gurney, & Co.*, as hereinafter provided." Several clauses provided for the absolute transfer to the new company of all cash balances, and ordinary business assets and liabilities; and then followed this clause:—"The vendors guarantee the limited company that, irrespective of any value to be attributed to the goodwill of the said business, their assets, of which the said limited company shall have and take the benefit on the said day of completion, shall, upon the actual realization, produce a net amount of money equal to or exceeding the aggregate amount of the moneys which the said limited company may have to pay or provide, or shall pay or provide, in satisfaction and discharge of all obligations and liabilities of *Overend, Gurney, & Co.* The limited company shall also pay to *Overend, Gurney, & Co.*, or there shall be brought into and allowed on account between them, as a sum payable by the said limited company to *Overend, Gurney, & Co.* on the day of completion, the balance which at midnight, on the said 31st of July instant, shall, as then

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appearing by the ledger of *Overend, Gurney, & Co.*, be standing to the credit of the account thereon kept, entitled 'The Private Ledger Account,' but that balance shall be treated and dealt with between the parties hereto as if it were a liability of *Overend, Gurney, & Co.*, which the said limited company are, by these presents, bound to undertake and satisfy in exoneration of *Overend, Gurney, & Co.;* and the guarantee of the vendors hereinbefore contained shall extend to and include the amount of such balance as if it were included in and formed part of the liabilities referred to in the said clause, in respect whereof such guarantee is given."

The sixteenth clause was as follows:—"It is hereby agreed that it shall be obligatory upon some or one of the vendors to continue to act under the style or firm of *Overend, Gurney, & Co.*, for the purpose of winding up, closing, liquidating, managing, settling, and arranging, any outstanding accounts, debts, liabilities, transactions, business matters, affairs, or things incidental to, or connected with, the business of *Overend, Gurney, & Co.*, which the directors of the limited company shall consent to, or deem it desirable or expedient, should be wound up, closed, liquidated, managed, settled, or arranged, by *Overend, Gurney, & Co.;* and no bills, promissory notes, mortgages, securities, or property of any description, which, on the 31st day of this instant month of July, shall be held by the vendors to the credit of, or as belonging or applicable to, any accounts so to be wound up and closed as last mentioned, shall be transferable, or transferred to, the said limited company, as part of the assets of *Overend, Gurney, & Co.*; but the same shall be reserved and excepted by *Overend, Gurney, & Co.*, to be retained, appropriated, applied, and disposed of, by them, and under their control, for the purpose of winding up and closing such accounts; and *Overend, Gurney, & Co.*, shall be at full liberty to do all such acts, and transact all business, whether in the way of discounting bills, enforcing the payment of securities, or otherwise howsoever, which shall, in their judgment, be necessary or proper for managing, working, winding up, and bringing to a final settlement, the accounts which may be so selected for being wound-up and closed as last aforesaid; together with all outstanding engagements and liabilities in connection therewith, or relating thereto."

The deed then provided for the sale of the house in *Lombard*

Street, the price of which was to be fixed by valuation; and there was a special provision, entitling the limited company to have the purchase-money "made available, as and by way of material guarantee, for their protection, in the same manner as has already been provided in reference to the £500,000."

There was a contemporaneous deed of arrangement, which was not made known to the public, bearing the same date as the deed of covenant, and executed by the same parties. It recited, at considerable length, the first deed, and it provided more particularly for the liquidation of the excepted accounts included in the "Suspense and Guarantee Account," and further provision was made for carrying into effect the arrangements respecting the sale and transfer of the business upon the basis of the indenture of covenant. A separate ledger called "The Ledger of Excepted Accounts," was to be kept by the firm of *Overend, Gurney, & Co.*, which was to contain entries to shew the condition of the excepted accounts, and a schedule was attached to the deed, which comprised all accounts subsisting between *Overend, Gurney, & Co.*, and the *Millwall Iron Works Ship Building Company*, and between *Overend, Gurney, & Co.*, and any other persons in respect of any shares in that company owned by, or hypothecated to, *Overend, Gurney, & Co.:*

All accounts subsisting and unsettled between *Overend, Gurney, & Co.*, and any company, partnership, firm, or individual, the affairs of which were then in course of being wound up, liquidated, settled or arranged:

All accounts subsisting and unsettled between *Overend, Gurney, & Co.*, and any company, partnership, firm, or person, or estate, in respect of any advances, loans, or investments, made by *Overend, Gurney, & Co.*, in or upon the shares, debentures, stock, or property of any company incorporated, or un-incorporated, which had been dissolved and wound up, or were in the course of being wound up:

All accounts which should be open in the books of *Overend, Gurney & Co.*, in respect of any unrealized property or securities accepted or taken by *Overend, Gurney, & Co.*, in satisfaction or settlement of any account which had theretofore been open, or subsisting, and unsettled, between *Overend, Gurney, & Co.*, and any other person or persons whomsoever.

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The company commenced business on the 1st of August, 1865, and suspended payment on the 10th of May, 1866, without having paid any dividend to the shareholders; but the whole of the 100,000 shares in the company were duly taken up, and calls to the amount of £15 per share paid thereon, making a total paid-up capital of £1,500,000, in addition to the property and assets of the old firm handed over.

The company was now being wound up under an order for continuing a voluntary winding-up under the supervision of the Court.

These motions were originally made before Sir *R. Kindersley*, V.C., on the 22nd of November, 1866, when the hearing was postponed, and an order was made for the cross-examination of the witnesses, a special commissioner being appointed for that purpose.

Before the conclusion of the cross-examination of witnesses, an order was made by Sir *R. Malins*, V.C., upon an adjourned summons from Chambers, for the payment to the creditors of a dividend of 4*s.* in the pound, and it was further ordered that the cross-examination of witnesses should be continued in open Court.

A call of £10 per share had been made by the official liquidators, in order to meet the payment of the above dividend.

A defence association had been formed, consisting of 652 of the persons whose names were on the register of the company, and who were holders of 20,073 shares, and the names of Mr. *Oakes* and Mr. *Peek* had been selected as representative cases, in order to try the liability of the other shareholders, who had taken their shares under similar circumstances.

Among the affidavits filed in support of the motion, was one by *Richard Oakes*, stating that he was a holder of twenty-five shares in the company; that he had paid the call of £10 per share made upon him by the official liquidators, under protest, to prevent the enforcement of the order against him for attachment. That upon the formation of the company he had received from the directors a printed copy of the prospectus issued by the directors to the public. That he was induced to think, from reading the prospectus, that the business which was to be sold to the company by the old firm of *Overend, Gurney, & Co.*, was a solvent business.

That he placed faith in this from the fact that three members of the said firm were stated in the prospectus to have become directors of the new company, who, he therefore considered, had full means of knowing the state of the old firm; and from the fact, also stated in the prospectus, that £500,000 was to be given to the members of the old firm as the consideration for the goodwill. That solely on the faith of the statements in the prospectus, and in the belief derived from those statements, that the business which was to be sold to the new company was a solvent business, he was induced to apply for 100 shares in the company, but he obtained an allotment of twenty-five shares only, which were registered in his name. Had he known that the liabilities of the old firm exceeded the value of their assets, he would not have applied for shares in the company. That he had no reason to suspect, till after the stoppage of the company, that the said business was not solvent at the time when it was transferred to the limited company; but at a meeting of the company, held on the 22nd of August, 1865, it was publicly stated that the firm of *Overend, Gurney, & Co.*, was insolvent before the new company was formed. He believed, from information derived from the accountant employed to investigate the affairs of the said firm, that upon a full investigation of the books and accounts it would be found that at the time of the purchase of the said business by the company, the firm of *Overend, Gurney, & Co.*, was insolvent to the amount of about £3,000,000; and that the statement in the prospectus, "that the terms, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders," was false and fraudulent.

William Peek, in his affidavit, stated that his name was on the register of members or shareholders in *Overend, Gurney, & Co., Limited*, as a holder of 2000 shares. That at the time of the suspension of payment by the company he had on deposit with the company the sum of £26,000, all of which was still due to him from the company. That upon the formation of the company he had received from the directors a printed copy of the prospectus, and was induced to think, from reading the same, that the business which was to be sold to the company by the old firm, was a solvent business. That at the time of receiving such prospectus he was not requiring an investment, and did not apply for any allotment

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of shares; but on the 17th of October, 1865, he had purchased, through his stockbroker, 1000 shares at 7½ premium, and subsequently he purchased a further 1000 shares at 6⅜ premium, all of which were transferred to him, and were now registered in his name. The remainder of this affidavit was to the same effect as that of Mr. *Oakes*, so far as related to his ignorance of the insolvency of the old firm until the public meeting held on the 22nd of August.

The affidavit of *Oswald Howell*, an accountant, who had been employed by the *Shareholders' Defence Association* to investigate the books and accounts of the company, was to this effect: that no list of creditors of the company had as yet been made out by the liquidators, but, in a report issued by them to the shareholders and creditors, on the 16th of August, 1866, the claims of the creditors, upon which a dividend would have been paid, were estimated to amount to £5,228,000, while the assets amounted to a considerably less sum, and a call of £10 a share, which, on the 100,000 shares in the company, would amount to £1,000,000, had now been made by the liquidators to enable them to pay a first dividend of 4*s.* in the pound; that having inspected the books of the company, under an order of the Court for that purpose, he had ascertained that the statement of assets and liabilities of the old firm upon which the business was transferred was as follows:—

1865.		£.	*s.*	*d.*
Cash	—Securities .	8,507,061	3	4
Do.	Advances .	1,070,573	0	9
Do.	Country Banks	5,658	18	11
Do.	G. L. . . .	13,303	10	0
Do.	Bills . . .	1,345,135	4	5
Do.	Cash . . .	120,394	7	2
Do.	Suspense and Guarantee.	4,213,896	16	4
Do.	D. L. . . .	1,969	19	2
Do.	S. D. . . .	3,648	17	9
		£15,281,641	17	10

1865.		£.	*s.*	*d.*
Cash	—Loans . .	9,006,422	0	7
Do.	Country Banks	1,909,458	9	2
Do.	D. L. . . .	25,628	4	1
Do.	Advances .	64,075	16	0
Do.	G. L. . . .	435,380	5	9
Do.	Rebate on Bills. . .	72,610	6	4
Do.	B. P. . . .	38,772	3	6
Do.	P. L. . . .	1,053,715	1	9
Do.	S. D. . . .	2,675,579	10	8
		£15,281,641	17	10

The above statement of accounts was a copy taken from the general ledger of *Overend, Gurney, & Co.*, shewing the state of the business of the firm on the 31st of July, 1865, the day on

which the books were made up previous to the transfer of the business; but nothing was included therein in respect of the liabilities of the firm in bills re-discounted, bills payable, credit granted, and guarantees, upon which the firm was, at the time of the transfer, liable to the extent of £8,808,699 8*s.* 3*d.*, many of such liabilities being on account of parties who had at that time failed, and upon which, therefore, it must have been well known that an ultimate loss would arise, and in respect of which the company had been called upon to pay a large amount for which no provision was made in the accounts; but he had not been able to ascertain the exact amount of such liabilities.

The item of £4,213,896 16*s.* 4*d.*, included in the above account, set down as an asset of the firm, represented a number of accounts, several of them for very large amounts, standing in the books, under the names of various parties, with balances to the debit of such accounts, apparently as debts due to the firm, including the *Atlantic Mail Steam Packet Company*, £839,345 19*s.*, the *Millwall Ironworks*, £422,565 12*s.* 5*d.*, and many others, to the amount of £3,969,188 7*s.* 7*d.*, the remainder being for small amounts. The whole of these accounts were treated as good debts owing to the firm, and, consequently, as assets of the firm; whereas most of them, if debts at all, were due from parties notoriously insolvent at the time the business was transferred, and which ought, therefore, to have been treated as bad, or as only good to the extent of the dividends likely to be received; others, instead of being good debts, were accounts upon which the firm was under liability, upon guarantees, or otherwise, to a large amount; so that, instead of anything being received therefrom, the amount of loss would be increased, and others, instead of being debts owing to the firm, merely represented moneys lost by the firm on the particular accounts.

That the accounts referred to in the schedule to the second deed, called "the deed of arrangement on the basis of contemporaneous indentures," were the whole, or the greater portion, of the accounts forming the above item of £4,213,896 16*s.* 4*d.*, and in making up such sum all the accounts were estimated at 20*s.* in the pound, although in the schedule they were treated, as in most instances, the liabilities of insolvent firms. That the "Sus-

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pense and Guarantee Account" to which the sum of £4,213,896 16*s.* 4*d.* was carried, was credited, in reduction of such amount, with the sum of £1,053,715 1*s.* 9*d.* balance standing to the credit of the partners in the firm on the 31st of July, 1865, and also with the sum of £250,000, the cash payment towards the purchase of the goodwill of the business, and subsequently with a further sum of £173,000, cash realized by the partners in the old firm on the sale of shares in the company at a premium, which would reduce the sum of £4,213,896 16*s.* 4*d.* to £2,837,181 14*s.* 7*d.*; but upon the working of the account during the time the company carried on business, and after giving credit for all dividends on moneys received on any of the accounts, the balance, on the 10th of May, 1866, amounted to £2,970,168 7*s.* 10*d.*, being an increase of £132,986 13*s.* 3*d.* upon the amount of the suspense and guarantee account since the transfer of the business. Various sums, to the amount of several hundred thousand pounds, had yet to be carried to that account in respect of liabilities of the old firm on the accounts included in the said sum of £4,213,896 16*s.* 4*d.*

As the result of his investigation into the books of the firm, he stated, that if the debts included in the sum of £4,213,896 16*s.* 4*d.* had, instead of being treated as good to the amount of 20*s.* in the pound, been estimated at their fair value at the time of the transfer of the business, according to the amount that might reasonably have been expected to be produced therefrom, and a proper allowance made for the liabilities the firm was under upon the bills re-discounted, bills payable, credits granted, and guarantees, amounting to the before-mentioned sum of £8,808,699 8*s.* 3*d.*, the firm would have been insolvent to the amount of at least £3,000,000.

He further stated, that from his examination of the books and affairs of the firm he believed that, for at least three years previous to the formation of the new company, the firm of *Overend, Gurney, & Co.* made no profits whatever, but that they made a large annual loss.

The affidavit of *John Henry Gurney*, filed subsequently to the affidavit of Mr. *Howell*, was to the following effect: that the business carried on by *Overend, Gurney, & Co.* was established about

the close of the last century, and was of an exceedingly profitable nature, and that for the five years ending on the 31st of December, 1860, after allowing interest upon capital, and upon the balances to the credit of the partners, the profits divided amongst the several partners averaged upwards of £190,000 per annum, but that subsequent to that period the actual net profits had not been ascertained or appropriated, but were reserved to meet the losses consequent upon the exceptional transactions thereinafter referred to.

That the business of *Overend, Gurney, & Co.*, was for many years carried on under the immediate superintendence of the late *Samuel Gurney* and *David Barclay Chapman*, but the former died in May, 1856, and the latter retired in the year 1857. That after this period the partners made very considerable advances of an exceptional character to various parties and companies upon securities of a speculative and uncertain nature, and as the deponent was apprehensive that such transactions would entail a considerable loss to the house, it was, on that account, arranged that no further division of profits should be made until such accounts were liquidated.

That in consequence of the lock-up of the assets of the house arising from these advances, and the losses consequent thereon, it was considered desirable that the business should be strengthened by fresh capital, and in the result it was determined to form a joint stock company.

That on the investigation of the state of affairs prior to the formation of the limited company, it appeared from the books that there were outstanding various debt balances, which were considered to be of a doubtful nature, to the amount of £4,199,000; but it was estimated that of that amount the sum of £1,082,000 would be realized, leaving, therefore, a sum of £3,117,000 still to be provided. That at this period it was estimated that the balance to the credit of the partners, when made up in the private ledger, would amount to £940,000, and deducting that sum from the balance of £3,117,000, there remained the sum of £2,177,000 still outstanding, and to be provided for.

It was calculated that the private estates of the several partners comprising the firm of *Overend, Gurney, & Co.*, and of their

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interest in the banking business carried on in *Norfolk*, and elsewhere, would produce the further aggregate sum of £2,320,000, and, after taking credit for the £500,000 to be received for the goodwill, and for £45,000 as the estimated value of the premises in *Lombard Street*, there would have remained a surplus of £688,000 in favour of the individual partners after providing for every liability of the firm of *Overend, Gurney, & Co.*

That the firm had given their guarantees for other parties in respect of various transactions, but at the time of the transfer of the business, it was believed that the securities held in respect of such transactions would, when realized, prove sufficient to cover the advances, and that no claim in respect thereof would arise upon the firm.

That the prospectus was prepared *bonâ fide*, and was intended to give the honest opinion of the directors as to the probable results of the transfer of the business to the limited company, and he believed that the guarantee given by the firm was ample against any loss which appeared likely to arise in realizing the assets and liabilities transferred.

Various other affidavits had been filed, but the statements contained in those already referred to were not materially affected.

The *Attorney-General* (Sir *John Rolt*), in support of the motion, on behalf of Mr. *Oakes* and Mr. *Peek*:—

The obligation of those who invite the public to come into such a company as this, is to represent truly and faithfully everything that may be necessary to enable the public to understand the nature of the contract into which they are invited to enter. If the representations then made are false, the parties induced by them to enter into the contract are released; and that, whether the parties making the representations did or did not know them to be false. The prospectus of the company represented it as a going, and a flourishing, and profitable concern, of which the goodwill alone was worth £500,000. By the deed of covenant, the liabilities are represented as being something like £15,000,000; bad debts could not of course be recovered, but they were to be met by a guarantee. Then the assets were also represented as amounting to £15,000,000. Had the assets been stated to have been several millions short of

the liabilities, no one would have taken shares in the speculation. A second and secret deed was accordingly made and executed, between and by the same parties, and of the same date, as that of the deed of covenant. The deed of covenant in no way referred to the second or secret one; but the latter recited the former one; and the deed of covenant was the only one which the public was invited to inspect. The particular item of £4,213,896, referred to in the deed of covenant, and described as the "Suspense and Guarantee Fund," was dealt with, by the secret deed, as included in the assets. It was well known to those who prepared that second or secret deed, with that reference to the item in it, that no such sum was in the assets; that, in fact, nearly the whole of it was a debt due from joint stock companies, and was substantially a bad debt. Both the old firm of *Overend, Gurney, & Co.*, and the limited company, knew that to be the case. They knew that the item included about £3,000,000 of bad debts. The schedule to the secret deed contained certain excepted accounts, which are really bad debts. But in an excepted ledger account, those excepted accounts are to be carried to the credit of the old firm; and, assuming their estimated value of £1,000,000 to be correct, there would have been a deficiency of those assets to the extent of £3,000,000.

The first deed would, therefore, leave no suspicion on the mind of any one reading it and the prospectus together, that the firm of *Overend, Gurney, & Co.*, was anything else than a flourishing concern; whereas the second deed shews that it was grossly insolvent. All those facts were well known to the partners in the old firm and in the new company; but they concealed them from the public. We therefore, say that we ought to be relieved from our liabilities as shareholders, on account of having been drawn in to take shares in a company represented to be a prosperous and a solvent concern; and to have been purchased pursuant to arrangements contained in a deed represented to comprise the whole arrangement, while, in fact, it is not so. We say, moreover, that if the whole arrangement had been disclosed, it would have shewn a state of things utterly different; and would have exposed to view such a hopeless case of insolvency as would have deterred any man from taking shares in it. It is true that the secret deed provided a guarantee

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on the part of *Overend, Gurney, & Co.*, that their private estates should be liable to make good any loss that might arise; and that the £500,000 for the goodwill was also to go for the same purpose. But even if the private estates were sufficient to satisfy the amount of the loss (which they were not), still that does not make the case better, nor does it make the representations of the directors as to the solvency of the firm true or accurate. That the old firm was not solvent at the time of the transfer is shewn by the affidavit of Mr. *Howell*, who says that for the last three years previous to the formation of the limited company, the firm of *Overend, Gurney, & Co.*, made no profits whatever, but, on the contrary, a large annual loss; and Mr. *Gurney*, in cross-examination, admitted that the firm had divided no profits since 1860. It is true he says that if all the private estates of the firm had been sold then the old firm would have been solvent; but what is there to shew the sufficiency of the guarantee for an amount of fifteen millions? There is nothing to shew the public the fact that at the time of the transfer the estate of *Overend, Gurney, & Co.*, was insolvent, to the extent of three millions; although if the partners sold off every acre of land, they might possibly be able to pay. But even so, those same private estates were left entirely under the dominion of the partners, who might have made away with them the following day; and there was no lien upon anything.

Upon that state of facts we contend, first, that the directors, members of the old firm, and directors of the new company, are the representatives of the company, and bind the company. They issue the prospectus; the whole company is bound by their representations, and we seek to affect the whole company with the consequences of those representations, although they may have been made, not by the company itself, but by their agents and managers. The case of *National Exchange Company of Glasgow* v. *Drew* (1) turns on that point, as well as *Burnes* v. *Pennell* (2); and *Kisch* v. *Central Railway Company of Venezuela* (3) rests upon the fact, that there was a misrepresentation in the prospectus: and the right of Mr. *Oakes* and Mr. *Peek* to be taken off the list of contributories to this company, as far as the shareholders are concerned, is complete, upon the authority of that case. Then, as to the

(1) 2 Macq. 103. (2) 2 H. L. C. 497. (3) 3 D. J. & S. 122.

liability as regards creditors, there are several cases which have been decided upon the ground of variance between the prospectus and the articles of association, where the latter have been wider and more extensive than the business proposed to be carried on by the prospectus. The Court has said that a contract under such circumstances is not binding; and, although creditors have contended that the shareholder had held himself out as a shareholder, and allowed his name to be put upon the register, the answer was, that his name was on the register of a company created for purposes larger than those described in the prospectus. The fact that he has been put upon the register without any warrant from him makes him not liable. There is no difference between such a case and the present one, where the shareholder takes shares upon the representations in the prospectus as to the concern being flourishing and solvent, while that statement is not true. If it turns out that some one has been wrongfully put there by misrepresentation, he is to be taken off, and he is to be deemed as never having been a shareholder and never liable to a creditor. He is in the same position, whether the misrepresentation is of the one class or the other: *Ship's Case* (1).

The object of the register is, not to shew the public whom they are to trust when dealing with the company, but that the creditor may know who are alleged by the company to be its members. It is to the company, and to those who are really its members, that they give credit. Fraud vitiates everything; and there is no liability upon a person as a member of the company when he has become a shareholder through the misrepresentations made to him. The creditors trust the company, and the question is, who are the company? But a shareholder who has been induced to take shares through fraudulent misrepresentations may have his name taken off the register, and he is no more liable than if he had never been a shareholder.

The law has not said that the register of members shall be conclusive, by whatever means a person is placed there; and so long as there are causes for taking a name off the register, a creditor cannot trust to the liability of all whom he finds on the register. A creditor knows that the fact of a man being on the

(1) 2 D. J. & S. 544; 11 Jur. N. S. 331.

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register is not a conclusive proof of his liability. It is useful to have upon the register those who, the company say, are members of it; but if they put upon the list some person who is not—as between the company and himself—a member, that person is not liable as a member. Such a shareholder is perfectly free to shew that he never ought to have been upon the list, and never was a member. That is the effect of what Lord Justice *Turner* has said in *Ship's Case* (1), and that case cannot be distinguished from the present one. I say that, in the words of the judgment in *Ship's Case*, he never intended to become, and never did become, a partner in the wretched concern that then existed. *Webster's Case* (2) is identical with this case. There the *Russian Company* represented in their prospectus that they intended to purchase a certain estate in *Russia;* but they took powers in the deed of incorporation to buy estates anywhere in *Russia.* Mr. *Webster* had not intended to become a member of that company, and never did become a member of it; but that is just the case here. Mr. *Oakes* never intended to become, and we say he never did, in fact, become, a member in this rotten concern.

Mr. *Baily,* Q.C., on the same side:—

First, what is the consequence, *quoad* the company, of the misstatements in the prospectus? There are several cases in which even reports made by directors in a company to the company itself have been held, when proved to have been improperly made, sufficient to annihilate contracts for taking shares, and strong enough to support an order for removing the names of persons from the list of contributories. This question was discussed in *Conybeare* v. *New Brunswick and Canada Railway and Land Company* (3).

But if, besides making a simple report to the company, the directors publish the report to the world, then it becomes the act of the company, and the persons who are misled by the report then stand in the same position as those who are misled by the company. No one has doubted, that if a prospectus, which, in its nature, is intended for the public, is a false and improper one, the

(1) 2 D. J. & S. 544; 11 Jur. N.S. 331. (2) Law Rep. 2 Eq. 741.
(3) 1 De F. & J. 578; S. C. 1 Giff. 339. 9 Jur. N.S. 570; ib. 164; 9 Jur. N.S. 575 H.L.

persons who may have been deceived by it, are to be let off from being contributories. That was the case in *Kisch* v. *Central Railway Company of Venezuela* (1), and *Ross* v. *Estates Investment Company* (2). In that case the prospectus was untrue, and the Court held that the party deceived by it was entitled to be struck off the list; so also in *Blake's Case* (3).

Then the question raised here is: What is the *status* of the different members of the company, *quoad* the creditors? In the case of an ordinary partnership, a partner who has been deceived by another partner may be entitled, as between himself and his partner, to have every loss made good by the person deceiving him; while, at the same time, he may be liable to the creditors of the partnership, because he has held himself out to the world as a member of the firm. But the position of companies under those Acts of Parliament, and the rights of creditors under them, are totally different. Under the Act of 1862, a company is not a partnership in any sense of the term, as it used to be under some of the former Acts. It is a corporation, and, in consequence of being incorporated, the result is, that there never can be a personal right against any individual of the company, at the suit of a creditor. Under former Acts, it was a company — not a corporation — with facility of suing and being sued by a public officer; but, *primâ facie*, the liability of each individual was very much what it was at common law in a case of an ordinary partnership. That, however, is no longer the law. This is a corporation under the Act of 1862, and not a partnership; and no creditor can make a personal demand against any individual of the company. Therefore, much of the law relating to common partnerships ceases to be applicable to the case of these companies. A creditor in all cases of a corporation has nothing but the funds of the corporation to look to,—that is, the assets of the company; and there is no personal liability in any member to a creditor. If a creditor of a company had permission given him to sue an individual member of it, it could only be to sue him in the name of the corporation; and then every right which existed between the corporation and the person sued would be equally available, whether the creditor, who was behind the scenes, was the Plaintiff, or

(1) 3 D. J. & S. 122. (2) Law Rep. 3 Eq. 122. (3) 34 Beav. 639.

11 Jur. N.S. 646.

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whether it was the company itself who played that character. It follows then, that, whatever may be the equities between the corporation on the one side, and the individual members of it on the other, those equities are binding on the creditors. The fact that the Act of Parliament requires that there shall be a registration makes no difference. The Act does not say, that every person who is on the list shall, for all purposes, be liable as a member of the company; it only makes the list *primâ facie* evidence, so that there the onus would be thrown on the other side, of shewing why, although the name of the party appears on the list, he should not be bound. The creditors might look at the list of shareholders, but if the shares were sold, and if, according to the constitution of the company, the vendors of the shares then ceased to be liable to the company, there could be no remedy against them. In a winding-up, the liability of a member is at an end when he has ceased to be a member for one year or upwards prior to the commencement of the winding-up. You cannot resort, in such a case, to a man who has transferred his shares more than a year; and not at all if the others can pay. The only way, under the present Acts, by which a creditor can go against an individual member, is by an order to wind up; so as to make calls upon him. Whether he can be called upon or not depends upon the relative position of himself and the company. A creditor, therefore, who trusts a company, does so with a knowledge of the law, that every one of those persons whom he sees upon the list at a particular time may be in a position to have his name removed from the list; and that if that event should happen, the creditor can have no remedy against him. He knows, in addition, that every one of those individuals has a right to sell his shares, and that, after a year's time, he will be relieved from any liability to the company itself. A creditor, then, having now no personal right against any member of the company, can only resort to the assets of it; and those must be got in by the usual process of calls, or by realizing the amounts in the ordinary course of trading. A creditor, finding a good business being carried on, will look to the assets of the company actually dealt with by them; not to the capital to be called up, but to the capital that is called up; and to the other things which are dealt with as part of their property. A creditor does not look to the

share register when he deals with a company, but he assumes that where there is a flourishing business going on, the assets of the company, actually realized, are sufficient to pay all the debts, because otherwise it would not be a profitable concern.

Now, supposing these two gentlemen should be taken off the list, there is no provision in the Act of Parliament which says you may be off the list *quoad* the company, but on the list *quoad* the creditors; and no case has arisen in which it has been held that a person who is not rightly on the list *quoad* the company, can be kept upon the list *quoad* the creditors. Within the last few years thousands of persons have been taken off lists of shareholders upon different grounds, but no distinction has ever been allowed in favour of creditors. The question was, no doubt, raised in two cases, namely, in *Ship's Case* (1), and *Webster's Case* (2); and those two authorities are in our favour. The present case is stronger than *Ship's Case;* for there, if Mr. *Ship* had looked at the articles of association, he would have discovered the nature of the company he was about to enter; whereas here, it was impossible to discover from the articles of association the real position of the concern. There was no intentional misrepresentation in *Ship's Case*, on the part of the persons who issued the prospectus; and in *Webster's Case* it might have been the same. We, therefore, have the opinions of the Lords Justices, and of Vice-Chancellor *Wood*, that the creditors look, not to the persons individually who form the company, but to the company itself, and to those who may be the actual members of it. Nor have they a right to be effectively heard on the question whether those parties should be removed from the list or not.

Then, as to what are the assets of the company, we say that the three millions and a half which are uncalled from the shareholders are not assets of the company, unless the company is in a position to recover them. A creditor cannot recover them. The company may recover them, but can do so only by its own rights. It is just like a claim of the company against a debtor of the company.

My argument, therefore, is, first, no personal liability; second, no right, except against assets; third, that what are assets, and what are not, must depend upon the rights of the company; and, as a

(1) 2 D. J. & S. 544. (2) Law Rep. 2 Eq. 741.

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consequence, that if a person is not entitled to be upon the list as against the company, nothing can come from him as assets of the company.

Mr. *Swanston*, on the same side, called the attention of the Court to the facts relating to the alleged surplus of £688,000, as shewn in the affidavit of Mr. *Gurney*, which was arrived at by including all the property, real and personal, of the individual partners; and submitted that that was a wholly imaginary sum, which had no foundation whatever. It was a sum arrived at by including, as assets of the firm and of the individual members, three sums, £500,000 for the goodwill of the *London* business; £300,000, their share of the goodwill of the *Norwich* business; and £45,000, the value of the premises in *Lombard Street*. These were the most important items. The first sum was, of course, worth nothing. As to the second sum, the share in the *Norwich Bank*, that was sold in March, 1866, before the failure of *Overend, Gurney, & Co., Limited*, to members of the family, for nothing: the arrangement being that the purchasers were to take the business, and if there were any profits during the first four years, then those profits were to be handed over to the vendors; if there were no profits, the purchasers still took the business, and handed over nothing to the vendors; so that the purchasers took it upon the chance of receiving, and the vendors sold it upon the chance of receiving, any profits, if there should be any, during the first four years. The remaining £45,000, for the *Lombard Street* premises, had been reduced to £26,000, which was the price at which the premises were sold to the new company. Under these circumstances, the guarantee of these gentlemen was, in fact, next to worthless.

He cited *New Brunswick and Canada Railway Company* v. *Muggeridge* (1), and pointed out the difference between that case and *Conybeare's Case* (2), and submitted that there was no obligation upon the shareholders, as between themselves and the company, to do more than to take the statements of the company, and it was not necessary for them to examine for themselves into the truth of the statements put forth. He also cited *Cox* v. *Hickman* (3); *Burls* v.

(1) 1 Dr. & Sm. 363. 7 Jur. N.S. 132.

(2) 1 D. F. & J. 570. 6 Jur. N.S. 578.

(3) 8 H. L. C. 268. 7 Jur. N.S. 1165.

Smith (1); *Wood* v. *Duke of Argyll* (2); *Lake* v. *Duke of Argyll* (3); and *Baird* v. *Planque* (4); upon the subject of "holding out" to the world, and shewing that a creditor is bound to prove that he allowed the debt to be incurred upon the faith of a person having held himself out as partner before the contract.

Sir *Roundell Palmer*, Q.C., for the official liquidator:—

If the arguments addressed to the Court on behalf of the shareholders were to be successful, it would involve, not merely the virtual repeal of all which the Legislature has done with respect to limited liability companies; but it would be, in truth, an act of the judicature putting the Legislature and the law in the situation of facilitating, and constructively committing, vast frauds upon the public.

The law has defined both the liability of the debtor and the remedy of the creditor. Down to the time when limited liability was introduced, there were no means by which the consequences of the ordinary law of partnership could be avoided, except a Royal Charter, or an Act of Parliament and even Parliament was not in the habit of authorizing the constitution of trading companies upon principles which would deprive the creditors of the rights they would have against the general partnership, although they regulated, and in some respects limited, those rights. The Acts which gave companies the right to sue and be sued by a public officer, at the same time gave the right to every creditor who recovered his judgment against the public officer, to get execution against every shareholder of the company, and even against past shareholders, for the period of three years from the date at which they ceased to be members. But the statute of 1862 is founded on a different principle. By that Act the Legislature did two things—incorporated the companies, and limited the liability of shareholders to the amount of their shares; and, while it gave no remedy to the creditors against the individual shareholders by *scire facias*, execution, or otherwise, it, for the first time, conferred upon creditors the right to come to this Court for the purpose of winding up the company. The law, which only

(1) 7 Bing. 705.
(2) 6 Man. & G. 928.
(3) 6 Q. B. 477.
(4) 1 F. & F. 344.

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imposed a certain limited liability on individuals, said also, that the creditors should know who were liable to them; and for that purpose a register was established, which might at any time be inspected, and there was to be an annual statement made by the company, which would explain who were the parties liable, and those persons were all the members of the company, so that if the public were inclined to enter into a contract with *A.*, *B.*, and *C.*, upon the footing of the limited liability, they were at liberty to do so. All the creditors could know was the memorandum and articles of association, and the register. They could see the amount of capital forming the company; and they could ascertain how many shares had been taken, and in whom they were vested. This they could learn under the Act of Parliament, from the register, and from the annual statement. They would then look to those persons as liable to the extent of the amount payable on their shares. In the present case, the shareholders put forward to contest the point do, in fact, represent 676 persons, all of whom would be swept off the list if their contention should be successful; and, in the result, only those would be left who signed the original memorandum of association, seven persons in number. This is consequently an attempt to defraud the creditors upon the pretence of invoking the aid of the Court to remedy fraud; to make the public the victim, because certain individuals say they have been victimized; and to throw the whole consequences of the fraud, which they allege against other people, upon the innocent public, who omitted nothing which it was possible for them to do, to make themselves secure; and who trusted no one but those whom the Legislature has told them they might trust. If there be a question whether one or other of two innocent parties is to suffer by assuming a fraud, it should not be the party who has done all in his power to protect himself, but the party who has enabled others to commit that fraud by his negligence, or supineness, or his confidence.

I will now examine the case, first upon principle, then upon the Acts of Parliament, and then upon the authorities.

The Vice-Chancellor:—I may relieve you of some difficulty, by stating that, unless I am bound by authority, I have not the slightest idea of acceding to the argument on the other side, when

I am told that the creditors, who, according to my view, have a right to look at the list of shareholders, and see that they are liable for three millions and a half of money, to be called up if required, are bound, looking at that list, to know that there may be an equity in every member to be taken off the list; that is an argument I cannot accede to.

Sir *R. Palmer*:—The radical fallacy in the arguments addressed to the Court is this:—the essential distinction has been omitted between these two cases: where there is a legal contract against which an equitable case for relief may be made in this Court; and cases where there is no contract at all. In the first case, it is obvious that the relief operates only as between the parties to the equity, that is, as between a man who has been induced to make a certain contract by means which this Court holds to be unfair, and on account of which it will set aside a contract in his favour. But it sets aside the contract only as between the parties to it. It does not affect the rights of other people who may have contracted with the party who has the equity, although he may have been led into that contract with third persons in consequence of the position which he assumed by virtue of the first contract, and against which he seeks relief. Nothing can better illustrate that principle than the case of *Rawlins* v. *Wickham* (1). It is quite plain then, that the principle of the Court of equity is to relieve, subject to the intervening rights of other people, and only as between the parties to the alleged fraud. In this case the identity between the company described in the prospectus, and the company formed by the memorandum and articles of association, is complete, and this forms the great distinction between this case and those which are relied upon. These shareholders have, by their own voluntary act, agreed to become members of *Overend, Gurney, & Co., Limited.* They have been content to judge of the propriety of that company by the prospectus, and they have abstained from making any further inquiries. All the forms are gone through for the purpose of their being placed on the register, and certain directors are authorized by them to carry on the business, and to contract liabilities. They were members of the company, whether they had any equity or

(1) 1 Giff. 355; 3 De G & J. 304.

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not to be relieved from that position afterwards. So far as the creditors are concerned, there is only one simple question, whether the shareholder was, in point of law, at the time of the winding-up, a member or not, and no equity can authorize the company to take him off the list as against the creditors. The creditors have an absolute right to have all the members on the list, whatever their equities *inter se* may be.

Under the *Winding-up Act* of 1848, it was the uniform decision that the question of liability to the creditor was immaterial. That was held in *Sanderson's Case* (1); *Dodgson's Case* (2); *Sutton's Case* (3); under that Act of Parliament it necessarily was so, because the creditors had no *locus standi* to petition, and they were left with their legal rights and remedies. They had no business in the winding-up, and were not recognised as persons who could gain anything from it, or lose anything by it.

Under the Act of 1862 the law was completely altered. The creditor is here made a competent Petitioner, and not only that, but the Act takes away the other legal remedies, and makes a winding-up the only means of enforcing payment of debts against the contributories. The first clause which is material is the 23rd, which provides that the subscribers to the memorandum of association, and every other person who has agreed to become a member, and whose name is entered on the register, shall be deemed to be members of the company. These gentlemen agreed to become members by paying their calls, and allowing their names to stand upon the register. An agreement to become a member of the company, followed by registration, constitutes, under that clause, *de facto* membership, and an equity to be relieved from such an agreement does not alter the fact of the agreement. Then there are clauses specifying the manner in which the register of shareholders is to be kept, and the amount of their shares and calls to be entered. The 38th clause states that, in the event of a company being wound up, every member shall be liable to contribute to the assets. The 82nd clause provides that any application to the Court for winding up a company is to be made by Petition, and may be presented by the company,

(1) 3 D. G. & Sm. 66. (2) Ibid. 85.
(3) Ibid. 262.

or by any creditor or contributory of the company; and any order to be made on such Petition, shall operate in favour of all the creditors, and all the contributories of the company. The object of this must have been to give to the winding-up the same effect as a decree for winding up a partnership, and of a bankruptcy in favour of creditors. Creditors have no other remedy, and the Petition is to operate in favour of both creditors and contributories, so that while the old remedy of creditors is taken away, the substituted remedy is in every respect equivalent to an administration in bankruptcy in their favour. If there are equities, as between contributories, then, by the 38th clause, they may be adjusted after all the debts and liabilities have been paid. The 98th clause provides that the Court shall settle a list of contributories, with power to rectify the register of members, and shall cause the assets of the company to be collected and applied in discharge of its liabilities. The 35th clause specifies in what cases the Court may rectify the register, that is, where the name of any person is, without sufficient cause, entered in, or omitted from, the register of members. But this cannot apply to a person who has paid his calls, and whose name, by his own consent, has been placed on the register. It can apply only to persons who have never entered into any contract, and not to those who have entered into it, and afterwards wish to get rid of it, and seek to be relieved from their liability. If a man has consented and agreed to be on the register, he is bound by his contract. The question is evidently to be determined upon the principles which are common to Courts of law and equity.

The cases decided upon that section are *Bunn's Case* (1); and *Higgs' Case* (2). Then we come to *Ship's Case* (3), and *Stewart's Case* (4). The company in which Mr. *Ship* consented to take shares was, in fact, one of a totally different nature to that which was established. That was the principle of those cases. They turned upon no equity, but it was a mere legal question whether the man agreed to become a member of that particular company or not, and that was decided upon the construction of the prospectus and the articles of association. This is not a case in which there is any want of identity between the company

(1) 2 D. F. & J. 275. 6 Jur. N.S. 1223.
(2) 2 H. & M. 657.
(3) 2 D. J. & S. 544. 11 Jur. N.S. 381.
(4) Law Rep. 1 Ch. 574. 12 Jur. N.S. 754.

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formed by the memorandum and articles of association, and the company put forward in the prospectus; it is, therefore, clearly distinguishable from *Ship's Case* (1). The Lords Justices considered that the super-addition, in the constitution of the company, of objects to which Mr. *Ship* had never consented, made it an entirely different company. *Ship's Case*, and others of that sort, were not decided upon the principle of there being an equity to be relieved from a contract, but upon the principle that the contract had never been made—that there was an absence of contract *ab initio* and *ad idem*. In this case the shareholder was put upon the register with his own consent, and nothing else was necessary for the purpose of the agreement. This is the company in which he applied for shares, and not a different company.

Then, in *Ex parte Briggs* (2), the memorandum of association was materially at variance with the prospectus; but, in one respect, the present case ranges itself with that case rather than the others, for in *Briggs' Case* the company had been actually formed, whereas in *Ship's Case*, and *Stewart's Case* (3), the prospectus was issued before any company was formed. There was no company formed at the time Mr. *Ship* took shares; there was only a proposal to form a company, and, in fact, they formed one of another kind; and he never did any act by which he bound himself to come into that second company, therefore none of the elements of that question can enter into this.

Two other cases referred to: *Burnes* v. *Pennell* (4), and *National Exchange Company* v. *Drew* (5), have no application to this branch of the argument, all they determine is, that if you can make out against the company such an equity as existed in the case of *Rawlings*, you may be entitled to such relief; but they have no tendency to go further, and they only extend to relief *inter se* as between the company and its members, and in no degree go to the question whether if a man be a *de facto* member at the time of the winding-up he is to be taken off the list, so as to deprive the creditors of their only remedy under the Act of Parliament.

In *Blake's Case* (6), he had applied for shares upon the faith of

(1) 2 D. J. & S. 544. 11 Jur. N.S. 331.
(2) Law Rep. 1 Eq. 483. 12 Jur. N.S. 322
(3) Law Rep. 1 Ch. 574. 12 Jur. N.S. 754.
(4) 2 H. L. C. 497.
(5) 2 Macq. 103.
(6) 34 Beav. 639.

a prospectus, and paid his deposit, and within a reasonable time the scrip certificates were sent him; but, before executing the deed of association, or before any registration of his consent to take the shares, he alleged that there was a substantial misrepresentation in the prospectus, and he then repudiated the shares and demanded a return of his deposit, which was submitted to by the directors, and it was not till a year afterwards that the company was wound up; that case is therefore no authority upon the present question.

As regards the two gentlemen now applying to be relieved from their liability, they stand in a different position. Mr. *Peek* purchased his shares in the market after the formation of the company, and his case is, at all events, governed by authority. If Mr. *Oakes* could not say that he did not mean to come into this company, most certainly one who purchased the shares in the market, and took a transfer of them, could not say so. The authorities are decisive upon this point, that even in circumstances which would entitle a shareholder taking shares directly from the company, on the very same representations, to be relieved from his shares, a person who purchased them, and is a transferee from others, cannot be so released. That was decided in *Nicol's Case* (1); *Duranty's Case* (2); and *Ex parte Worth* (3). The distinction is great between a case where false representations are made by parties to the contract, and where they are made by third parties.

I now come to the question of fraud, and it is quite clear that no case of fraud or misrepresentation has been shewn. The real case set up is this, that, under the circumstances, there was no communication of something which ought to have been communicated. Such a ground can only go to rescinding an actual contract; it cannot possibly shew that the contract was not entered into in point of fact, or that a person did not agree to become a member of the company, and no equity can be maintained which is founded upon such ground, as far as creditors are concerned. The prospectus states the amount to be given for the goodwill, and adds, "terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the share-

(1) 3 De G. & J. 387. 5 Jur. N.S. 205. (2) 26 Beav. 268. 4 Jur. N.S. 1068
(3) 4 Drew. 529. 5 Jur. N.S. 505

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holders." That is a mere representation as to the future expectations of the company in the opinion of the directors. That that was a *bonâ fide* opinion there can be no doubt, since the directors had so large a stake in the concern themselves. Mr. *Rennie* had 400 shares, amounting to £20,000; Mr. *Gordon* had 200 shares, representing £10,000; Mr. *Gibbs* subscribed for 1000 shares, representing £50,000, but afterwards sold 200, retaining 800; Mr. *Barclay* took 1000 shares, which he continued to hold to the end, although the shares were at one time as high as 9½ premium. The evidence proves that at one period this business was carried on at an enormous profit, amounting to as much as £200,000 per annum; and though subsequently, in consequence of the death of the older partners, and the management coming into the hands of younger men, there had been very heavy losses, still there was no reason why it should not recover itself and become again as prosperous as before; at any rate, it is evident that these gentlemen themselves believed firmly in the probability of such an event, if the business were conducted on sound mercantile principles.

As to the guarantee which was taken from the old firm, the estimate was made in perfect good faith, and the value of the very large private estates of these gentlemen, if that estimate were realized, would serve as a surplus in favour of the old firm, of £688,000. That was a *bonâ fide* estimate at the time it was made, liable, of course, as such estimates always are, to fluctuation.

But the difficulty upon this branch of the case is, that the argument is not founded upon what is said in the prospectus, but upon the supposition that something else ought to have been stated about the risks, hazards, and uncertainties, which might attend the realization of those expectations; but if a thing is *bonâ fide* deemed to be worth money, and if honest men are willing to risk their money in it, it is a very strong thing to say that they ought to go on and state that which will defeat all their expectations.

With regard to the argument, that the second deed ought to have been produced: in the first place, it is not very likely that any of the gentlemen would ever have taken the trouble to read the first deed; but no one can look at that first deed without seeing that it speaks of excepted accounts which are to be the subject

of special arrangement; and if the question had been asked, what these excepted accounts were, the information would have been given, and there is no reason to suppose that everything contained in the accompanying deed would not have been explained. It is simply a deed naturally following from the existence of a guarantee on the one hand, and an obligation to pay the £500,000 on the other hand, and to regulate the way in which the suspense and guarantee account shall be kept. At any rate, there is no misrepresentation, either in words or in substance, and certainly there cannot, in any view of the case, be such a state of things as to bring this within *Ship's Case*, or the *Russian Case*. Upon these grounds, I submit that this application must be dismissed.

Mr. *Mellish*, Q.C., on the same side:—

I will assume, for the purpose of arguing the legal question, that these shareholders were induced to become members of the company by fraudulent representations in the prospectus. It is true that the Legislature has deprived the creditors, in case of a company being wound up under the Act of 1862, of all remedy in the common law Courts, and their remedy is to be obtained in this Court; but that has been done simply for the convenience of administration, because the common law Courts have not the machinery which would enable them to settle such complicated questions as these. But the right of the creditors remains a purely legal right. The only question is, whether Mr. *Oakes* was, or was not, at the time the winding-up order was made, a member of this company within the 38th section of the Act (25 & 26 Vict. c. 89). That section enacts, that every past and present member of the company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company. Mr. *Oakes* was actually a member at the time the company stopped payment, within the meaning of this section. A contract procured by fraud is a voidable contract, at the option of the person defrauded, but, until avoided, it has existence as a contract, and he is liable to all the effects of that contract. If he can set aside the contract, then he is entitled, as between himself and the party who was guilty of the fraud, to be restored to everything he has lost by reason of the fraud. But he can rescind the con-

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tract only subject to all the rights of innocent third parties, which remain valid, notwithstanding the contract is rescinded. If an ordinary partnership were entered into between *A.* and *B.*, and one party discovers that there was a fraud practised upon him, he may at once have the partnership dissolved, but he will still be liable for all the debts contracted while he was a partner; but if a man has never entered into a contract to become a partner, then, as in *Ship's Case*, he is not liable. The allegation here is, that he was induced to enter into the contract by fraudulent representations; if so, the contract may be set aside, but the partnership is the same partnership held out to him, and, therefore, it is not like *Ship's Case*. As to a contract being voidable, on the ground of fraud, at the election of the person defrauded, I will cite *White* v. *Garden* (1); *Load* v. *Green* (2); *Wright* v. *Lawes* (3); *Kingsford* v. *Merry* (4); *Pease* v. *Gloahec* (5). Then as to cases applying to joint stock companies and shares, there are the following cases: *Deposit Life Assurance Company* v. *Ayscough* (6), which is an authority for the first proposition, but not as to innocent third parties; but these rights were involved in *Henderson* v. *Royal British Bank* (7); *Daniell* v. *Royal British Bank* (8); *Powis* v. *Harding* (9).

In this case, however, I contend that there were no fraudulent representations; for the directors, in stating that they believed the concern would prove highly advantageous, were only stating their own opinion. It was merely a mistake in judgment. The directors had come to that opinion after a careful examination of the affairs of the old firm, and the applicants for shares were content to abide by their judgment. There was no representation of fact, but only of opinion.

There is no legal fraud in this prospectus. To constitute a legal fraud, there must be moral fraud. At common law there is no such thing as legal fraud without moral fraud. There are certain statutes, no doubt, which make things fraudulent which may be most innocent things in the eyes of the world. As, for instance, under the statute of *Elizabeth* against fraudulent conveyances, a

(1) 10 C. B. 919.
(2) 15 M. & W. 216.
(3) 4 Esp. 82.
(4) 11 Ex. 577; 1 H. & N. 503.
(5) Law Rep. 1 P. C. 219.
(6) 6 E. & B. 761.
(7) 7 Ibid. 356.
(8) 1 H. & N. 681.
(9) 1 C. B. (N. S.) 533.

man may have made a conveyance without consideration, and yet under that statute it would be held to be fraudulent against a subsequent conveyance for value. But, independently of statute, there is no such thing as a legal fraud which is not a moral fraud. It is a misfortune that the word fraud has ever been applied to transactions which do not involve any moral fraud at all. To make this prospectus fraudulent at law there must be in it either a representation which the directors knew to be untrue, or a reckless representation of which they did not know whether it was true or false. If a director, in issuing this prospectus, knew that the terms of the purchase were not likely to insure a highly remunerative return to the shareholders, that would have been a fraudulent representation; so, if he had never examined into the affairs of *Overend, Gurney, & Co.*, and did not know in the least whether it was likely to insure a remunerative return or not, it would be equally fraudulent. In this prospectus there is no statement of the amount of the assets, or of the liabilities, and no balance sheet is represented, and nothing is said respecting profits that have been earned during late years. The applicants for shares trusted to certain gentlemen of known experience, in the same interest as the shareholders, who had examined into the affairs, and if they did *bonâ fide* come to the conclusion that the business would be remunerative, surely that is an honest prospectus. The utmost it can amount to is a mistake in judgment. There was nothing concealed, and there was nothing stated of their own knowledge.

Mr. *Roxburgh*, Q.C., followed on the same side.

Mr. *Cole*, Q.C., for Mr. *Oppenheim*, who, under an order of the Court, had been appointed to represent the general interests of the creditors.

Mr. *Locock Webb*, on the same side, pointed out particularly the difference which existed between the present case and *Ship's Case* (1). He also cited *Athenæum Assurance Company* v. *Pooley* (2).

Mr. *Chapman Barber*, for Mr. *James Stephenson*, who was a holder

(1) 2 D. J. & S. 544. (2) 3 De G. & J. 294.

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of shares to the amount of £1200 in the company, and Mr. *Bristowe*, for two shareholders having eighty shares, and representing others who took the same view, also opposed the motions, and cited *Felgate's Case* (1).

Mr. *Glasse*, Q.C., for Mr. *Rennie*, and Mr. *Gordon*:—

As far as the legal question is concerned, I shall not again go over the cases already commented upon, but it is material the Court should understand that Mr. *Oakes* and Mr. *Peek* have given independent notices, founded on the 36th section of the Act, 25 & 26 Vict. c. 89, which gives the power of rectifying the register. I submit, as to Mr. *Peek*, he has put himself out of Court. He is a transferee of shares, which leads to this absurdity, that the person from whom he took would be liable as a past member, and could not get off, because the sale of his own shares would be a ratification of his bargain to take. The receipt of the prospectus in July could not have been the proximate cause of his purchasing shares in October. For that I refer to *Barrett's Case* (2), and *Conybeare* v. *New Brunswick and Canada Railway and Land Company* (3). *Peek's* only remedy, if at all, is against the persons from whom he took the transfer. He purchased the shares because he thought it would be a good speculation, but not on the faith of the prospectus.

The only ground upon which the Court can grant the application, is, that there was a misrepresentation in the prospectus. There was no such misrepresentation. The purchase was an exceedingly good one, and offered a highly remunerative return, which would have been produced but for unforeseen circumstances over which the parties had no control, and so long as the business continued, a large profit was made.

As to the second deed, which has been called the secret deed, there was no secrecy about it. It was rendered necessary by the form of the first deed, which provided that a separate ledger should be kept for excepted accounts. If any one had inquired what these excepted accounts meant, they would, no doubt, have been informed of the contents of the second deed, and they would then

(1) 13 W. R. 294, 305. (2) 8 D. J. & S. 30; 2 Dr. & Sm. 415.
(3) 1 D. F. & J. 578; 1 Giff. 339.

have found that there was that large item of "Excepted Accounts" which were carried to the "Suspense and Guarantee Accounts," for which there was to be certain provision made, namely, that the £500,000 for goodwill was not to be paid, but to go over to the suspense and guarantee account; there was also the value of the property in *Lombard Street*, said to be worth £45,000, and there was the personal guarantee of the old partners. The private estates were estimated at £2,320,000, and the whole together would make £2,865,000 included in the guarantee, besides that which stood to the credit of the partner's separate accounts.

The gentlemen for whom I appear have taken a large number of shares, and continued to hold them to the last, which is sufficient proof of their faith in the prospects of the concern.

Mr. *Fooks*, on the same side.

Mr. *Fry*, for Mr. *Henry Ford Barclay*, who came into the concern as a new director, and who had subscribed for 1000 shares or £50,000 capital of the company, and had continued to hold these shares from the first. Mr. *Barclay* had taken no part in the preparation or issue of the prospectus, but had joined the board.

Mr. *Mathew*, for Mr. *J. Henry Gurney*, Mr. *Henry Edmund Gurney*, and Mr. *Robert Birkbeck*, who were members of the old firm, and joined the new firm as directors, submitted that the large number of shares held by these gentlemen was proof of their complete faith in the prospects of the concern.

The *Attorney-General*, in reply, was proceeding to contend that the prospectus was the prospectus of the company, and not of the individual directors, when

[The VICE-CHANCELLOR said he had no difficulty on that subject. He was quite satisfied that the prospectus must be considered as the prospectus of the whole company.]

The *Attorney General:* — That point being conceded in my favour, my next proposition is, that the prospectus so issued was framed so as to mislead the public on points material to the object for which the prospectus was issued, though it may not

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be necessary to maintain that it was purposely done. It has been said that there is no such thing as legal fraud apart from moral fraud. That proposition I may accept unreservedly; but it is my duty to contend that these gentlemen have been guilty of moral fraud in the matter. Whenever a contrivance is resorted to for the purpose of keeping something back to deceive others, there is moral fraud, however you may justify it to yourself. That was the state of things in this case. It has been said that this conduct was justified by the circumstances. If the directors had openly stated that they were only putting forward their opinion, there would have been room for an argument in their favour, but the opinion was rested upon facts supposed to be universally known, while the only persons who knew anything on the subject were aware that it was false. In ascertaining the liabilities of a mercantile concern, you must take it as if actual bad debts had been written off. In this case they abstained from writing off bad debts. It was on that account that the £4,213,896 was left as an asset. They wished it to appear that there was a balance of £1,053,000 in favour of the old firm over and above their liabilities, but the actual state of the case was, that the whole of the £4,213,896, except £1,082,000, should have been written off, for that was all that was expected to be realized from the £4,213,896. But this was not the only loss, for it is admitted that there were liabilities to the extent of over £8,800,000 upon bills outstanding in the hands of other persons, upon which *Overend, Gurney, & Co.*, would be liable if those other persons did not pay the £8,800,000, and many of these liabilities were on account of parties who had at that time failed, and upon which it was well known that an ultimate loss would arise. Therefore there was, beyond the £4,213,896, the probable loss upon £8,800,000, £8,500,000, and £1,345,000, making a total of between eighteen and nineteen millions. Now, any person dealing with such accounts would calculate upon at least £10 per cent. for a margin of loss, particularly when it was well known what ultimate loss would arise upon the £8,800,000. The books shew that beyond the £4,213,896 carried to the "Suspense Account," as being in the nature of bad debts, of which little could be realized, there had been carried to that account an additional sum of £1,300,000 in

the ten months before the failure, so that which I say would, on a fair estimate, produce a loss of £1,800,000 upon £18,000,000 (that is, £10 per cent.) had actually produced £1,309,000. Take the figures as you will, the concern was insolvent to an extent of at least £3,000,000, and against this were the separate estates of the partners; the highest they were put down at is £2,820,000, including the goodwill, shewing insolvency even with these estates. As for the guarantee, it was one which they were not justified in relying upon. It was neither of an amount, nor of a character, which, as business men, they had the slightest right to allow.

Under these circumstances, there was no reasonable prospect that the new firm could, without great loss, have made good the insolvency of the old firm. If so, there clearly was moral fraud in making the representations contained in the prospectus. Acting on the public ignorance of the real facts, they concealed the truth, and wilfully deluding themselves, as well as the public, they very possibly hoped and believed it would turn out well, and therefore thought they were justified in this concealment.

Upon the legal questions arising on this state of facts, it has been argued, first, that the contract was voidable only; and, secondly, that innocent parties acting on the faith of it until avoided are protected. I submit that the whole doctrine comprised in these two propositions applies only to cases of the delivery of goods, or the delivery, by the fraudulent possessor of some legal symbol of property, the possession of which is *primâ facie* evidence of property in the possessor—the delivery of such a symbol of property to the fraudulent doer, who, having this symbol of property in his possession, passes it for value to an innocent purchaser, and who therefore asks to be protected. The doctrine is suited to cases of that class. It implies that the innocent purchaser is acting on the faith of the specific contract in question. It must be a direct acting upon the faith of a specific contract, or the doctrine does not apply. The principle of the doctrine can have no application whatever as between creditors and members of a corporation proper.

If the real owner has enabled the fraudulent doer to obtain the symbol of title to hold out to the world that he possesses the goods

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and is the owner of the goods, the contract by which he has done it is only voidable, and, so long as that contract is not avoided, the world must be protected in dealing with the owner.

A creditor who gives faith to the contract of a corporation, gives faith to this, that there is a corporation with a certain number of shares to be issued, and certain capital to be held. He knows the claim is against the assets of the corporation; he has no claim at all against individuals. He can get in the assets of the corporation, and that is all he can do. In this case I am an individual corporator, the corporation is the other party to the contract. I say that I was drawn into it by fraud, and I am entitled to have the contract set aside. The creditor has no remedy except against the corporation and the corporation assets, which are the calls due from the shareholders. He has no right to anything but what the corporation can recover, and can only recover that through the medium of the corporation. I rely, therefore, upon the distinction between a contract of principal and agent, and a contract of partnership, and the delivery of goods, or the delivery of some symbol which carries with it evidence of the thing being in possession of the alleged fraudulent doer. Further, I rely upon the acting which must have been upon the faith of the specific contract; but they are all summed up in this, that the creditor has a right against nothing but the corporation assets, which must first be got in by the corporation. Then the question comes round to whether the corporation have a right to recover these sums as against me. The cases cited on the other side establish this—that a contract obtained by fraud for the sale and delivery of goods is a voidable and not a void contract; that if fraudulent, the vendor may avoid it, and if avoided, though between the original vendor and the original purchaser it is set aside *ab initio*, the *bonâ fide* purchaser in the meantime is protected. *Kingsford* v. *Merry* (1) illustrates this. No case can be cited on this point which touches any contract other than a contract for the sale and delivery of goods, the possession of the goods following the contract.

That doctrine does not extend to the case of principal and agent, where the agent induces the principal by fraud to appoint him his agent. It does not apply, consequently, in any case where the

(1) 11 Ex. 577; 1 H. & N. 503.

innocent purchaser, or the person alleging himself to be so, has not acquired the very property which is the subject of the specific contract in question, by that specific contract. My clients would be the principals, and would employ the corporation, or their agent, to do acts in the name of the corporation.

The corporation, by virtue of that agency which I have entrusted them with, have not pledged my individual credit to the creditors, they only pledged the credit of the corporation.

The creditors' rights are against the assets of the corporation, and those assets are what they can recover, and nothing more. The corporation must sue its contributories, and I, as a member, set up my rights, as against the corporation, to say I am not a member. If I succeed against the corporation, the only right of the creditors would be to get so much of the assets of the corporation as they could obtain and no more. My rights, as against the corporation, must be determined by the question whether they have induced me honestly to become a member.

The case of *Henderson* v. *Royal British Bank* (1), arose under the Act of 1844, and the great difference is this, that, under that Act, the creditors had a right against all the contributories by applying to a Court of law, but only to a limited extent. The Act of 1862 was not a mere change of machinery but a great change in public policy, and gives the creditor the power only of going against the corporation, and not the individual members. The corporators in future were to owe their debts to the corporation, and not to the public. That is substance and not machinery. The shareholders have no liability beyond the amount they have contracted to pay to the corporation; whereas, under the Act of 1844, they were liable individually to the creditors, irrespective of any contract with the corporation.

The principle of "ostensible partnership" does not apply to the case of a corporation, but only to an ordinary partnership. The list of shareholders on the register is only *primâ facie* evidence of their being members, but every creditor knows that it is subject to the rights of such shareholders, against the corporation, to be removed from the list. As regards *Ship's Case* (2), there is no distinction between it and the present case. There, Mr. *Ship* contracted to

(1) 7 E. & B. 356. (2) 2 D. J. & S. 544.

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become a member of a company, the objects of which were said to be one and two, whilst in truth they were one, two, three, and four. Here, we were deluded into becoming members of a company to take over a business which, we were led to believe, was making large profits. In one case the misrepresentation was as to the objects of the particular company, in the other, the misrepresentation is, as to the state of that company at the time of its formation.

Mr. *Roxburgh*, Q.C., referred to a case decided on the previous day (21st of January), by Vice-Chancellor *Wood*, *Chapman & Barker's Case* (1).

The *Attorney-General*, in commenting upon that case, said it confirmed his arguments, as it led to this conclusion: that any person put upon the register by fraud, if he was entitled to be taken off as against shareholders, was entitled also to be taken off as against creditors.

Feb. 9. Sir R. Malins, V.C:—

These are two motions by shareholders of the company that their names may be taken off the list of contributories, and may also be removed from the register of members of the company. One of the motions is on behalf of Mr. *Oakes*, who is an original allottee of shares, and the other on behalf of Mr. *Peek*, who became a purchaser and transferee of shares a few months after the formation of the company. Both motions were made on the ground that the parties moving were induced to take their shares by means of false and fraudulent statements in the prospectus, and that they are consequently entitled to be relieved from all contracts based upon those false and fraudulent statements. The parties moving represent, as stated in the affidavit of Mr. *Rawlins*, their solicitor, an association formed to contest the liability of the parties to be retained on the register of shareholders and list of contributories, and it consists of 676 members, representing the holders of 20,744,

(1) Law Rep. 3 Eq. 361.

or rather more than one-fifth, of the shares of the company. I have not had a suggestion that the case of these shareholders differs in any respect from that of the holders of the remaining 79,256 shares, and the motions consequently raise the question whether there are any shareholders in the company, other than the seven directors, and perhaps one other gentleman who signed the memorandum of association for 600 shares, but did not become a director. The motions are opposed by the official liquidator, who represents the company and its creditors; and also by the creditors, by their appointed representative, Mr. *Oppenheim;* by one creditor, Mr. *Stephenson,* who appears at his own expense; and by the directors, not only on account of the pecuniary interest they have in keeping these parties on the list, but also for the still more important object of endeavouring to vindicate themselves from the charges of fraud which are made against them.

The questions raised are of the highest importance to the parties concerned, and also to the commercial interest of the country.

The case was most fully and ably argued on all sides on the 17th, 18th, 19th, 21st, and 22nd of January last, and if I err in the judgment I am about to pronounce it will not be for want of the best assistance which can be given to the bench by the learning and ability of the bar.

In order to understand and appreciate the position of the different parties, it will be necessary to advert to the circumstances which led to the formation of the company.

The great firm of *Overend, Gurney, & Co.,* is stated on all sides to have been founded towards the end of the last century, and it had, consequently, been in existence for at least sixty-five years, when it was determined to turn it into a limited company in the month of July, 1865; during that long period it had attained the highest commercial repute, and was universally considered, by those best informed on such subjects, to be one of the most flourishing and money-making concerns in the greatest commercial city of the world, and it was not, therefore, surprising that the 100,000 shares, of which it was proposed the company should consist, were eagerly sought for and immediately taken up, or that they speedily rose to a high premium in the market. It does not appear very clearly how the idea of turning this supposed flourishing concern

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into a limited company originated, though the subject is adverted to in the affidavits of Mr. *Rennie* and Mr. *Gordon*. There appears to be no reason for doubting that this great concern did realize enormous profits down to about the years 1857 and 1858. Mr. *John Henry Gurney* states, in the second paragraph of his affidavit, filed on the 13th of November last, that in the five years ending on the 31st of December, 1860, after allowing interest upon capital and upon balances to the credit of the partners, the profits divided amongst the several parties averaged upwards of £190,000 per annum.

This was an extraordinary result to be produced by the transactions of one firm, and if that state of things had continued, probably no change would have been attempted in the constitution of the firm, and the painful questions which have arisen out of that change, and which have now to be decided, would have been avoided. But it appears that in consequence of the death of some of the old partners, and the retirement of others, a great change in the mode of conducting the business took place about 1858 or 1859, and a result was produced which rendered it necessary for the partners either to obtain an accession of capital, or bring their business to a close. This state of things no doubt led to the suggestion of turning the concern into a limited company, which would bring in the additional capital, which the directors say they considered to be necessary in order again to produce the state of prosperity which had existed for so many years prior to 1859. In 1865 the partners in the concern consisted of nine persons, of whom four, namely, Mr. *Samuel Gurney*, Mr. *Henry Edmund Gurney*, Mr. *David Ward Chapman*, and Mr. *Robert Birkbeck*, carried on the business in *London*, and the remaining five were engaged as bankers in different places in the country. Upon the formation of the new company, it was thought necessary that new directors should be introduced, in order to represent the shareholders, who might bring in the new capital required, and who, by their high character and well known commercial standing in the City of *London*, might give confidence to the shareholders, and cause the concern to float, as it is termed, in the language applicable to such matters. Accordingly, Mr. *Henry Ford Barclay*, the late Mr. *Thomas A. Gibb*, Mr. *Harry G. Gordon*, and Mr. *William Rennie*,

were applied to, and consented to join the board. It is but justice to the old firm to say that to those four gentlemen, who must be considered as the representatives of the shareholders in the proposed new company, the fullest disclosure of the state of the concern was made. No one fact appears to have been concealed from them, and to them it was disclosed that the firm of *Overend, Gurney, & Co.*, the name of which had such a magic charm in commercial circles, was no longer what it had been; that it had not only ceased to make profits, but that it had been carried on at an enormous loss for several years, and that it was, in fact, at that time insolvent to the extent of two, if not three, millions sterling. Mr. *John Henry Gurney*, in his cross-examination, states that "from 1860 the total result of all the operations of our firm was a loss," and he says, "I was aware at the time that there had been no profits in the business on the whole since 1850. I cannot say of my own knowledge whether Mr. *Henry Edmund Gurney*, and Mr. *Gordon*, were also aware of it: but I have no doubt they knew as much about it as I did; I endeavoured to explain the state of facts to all the directors of the limited company." These were astounding disclosures to make, and, having been made, the surprise, nay, astonishment, is, that four gentlemen could have been found who, having such facts communicated to them, could have thought it not only prudent, but justifiable, to proceed in the formation of the company, and to induce others to embark their capital and credit in it. But they did so, and this has led to the present lamentable result—lamentable to themselves, the shareholders, and to the creditors of the company; and to the great commercial interests of the country: and it has raised the question which I am now called upon to decide.

In order to make the concern bear the appearance of solvency, it was necessary to take credit for a list of debts owing to it, and amounting to £4,199,000 (I take the figures from Mr. *J. H. Gurney's* affidavit of the 13th of November last, paragraph 7); but which, after careful examination, were estimated as not likely to produce more than £1,082,000, leaving, therefore, a deficiency of £3,117,000. If the four new directors had proposed dealing with their own property only, they might have dealt with these figures as they thought proper; but as they were about to induce others to

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advance their money for the purpose of carrying on this insolvent and ruined concern, could they, upon any principles of morality or justice, be right in concealing so appalling a fact? I am most decidedly of opinion that they could not. But it seems they persuaded themselves, or allowed themselves to be persuaded, that they might rely upon the guarantee of the old partners to make good the deficiency of the assets; and that, by avoiding the reckless mode of conducting the business which had been adopted since 1858 or 1859, they might restore the prosperity of the concern, and again make it what it had been from its foundation till 1858. But were they not bound to tell those they invited to take shares, of the speculation on which they were proceeding, and to give them an opportunity of deciding for themselves whether they would join an insolvent and losing concern in the hope of turning insolvency to solvency, and ruinous loss to profit? I am again decidedly of opinion that they were. They, however, adopted no such course, but, with a full knowledge of all those appalling facts, in conjunction with the three old partners, Mr. *Henry Edmund Gurney*, Mr. *John Henry Gurney*, and Mr. *Robert Birkbeck*, issued this prospectus:—[His Honour then read the prospectus already set out in the statement of the case.]

Now, what does this prospectus expressly or impliedly state? First, "*Overend, Gurney, & Co.*" is printed in large letters, because they knew that the public believed it to be a most profitable and flourishing concern, while they knew it to be neither the one nor the other. Secondly, the business is represented as so profitable and flourishing that it was worth while for the new company to give the enormous sum of £500,000 for the goodwill. Thirdly, that even giving £500,000 for the goodwill, the returns were such as, in their opinion, could not fail to ensure a highly remunerative return to the shareholders. And, fourthly, the shareholders were told that they could inspect the company's memorandum and articles of association, as well as the deed of covenant relative to the transfer of the business; and while there were, in fact, two deeds, only one of them was offered for inspection. Now it requires no argument to prove that if the public had been told by the prospectus what those who issued it knew, not a single share would have been taken. The concealment of some of the facts, and the mis-statement of

others, has led to the shares being taken, and to the shareholders being deceived in the manner of which they complain.

The Attorney-General argued, and I entirely agree with his argument, that allowing another to act on the belief of facts which you know to be untrue, is fraud; he applies the argument to this case by saying that these directors, by allowing the public to take shares in the concern in the belief that it was solvent and flourishing, while they knew it to be insolvent and losing, was a fraud. Again, the payment of the enormous premium of £500,000 for the goodwill clearly implied that those who had agreed to pay it were satisfied that the concern was flourishing and profitable, for I suppose the payment of such a premium would not have been justifiable by mercantile usage unless there had been a profit of at least £150,000 per annum. I say that, because experience shews that from about three to four years' purchase is the utmost that I believe is ever given for the goodwill of a business. Again, the assurance that the returns were such as could not fail to be highly remunerative, was wholly unjustifiable, from the fact of there having been a loss of at least half a million per annum for the last five or six years from bad debts, and that surely raised a doubt whether, in the present state of the financial affairs of the country, bad debt was not so necessarily incident to such a business, that profit could not be reckoned on with any degree of certainty. And with regard to the production of one of the two deeds only, I am bound to say I can find no excuse for one of them having been kept back. If it had not been for the desire to keep the shareholders in the dark, there was no necessity for two deeds, the whole transactions might with perfect facility, and would with propriety, have been carried out by a single deed, and on the face of that deed the amount of the deficiency of the assets ought to have appeared, and the guarantee of the old firm ought to have been made to extend in distinct terms to the amount of the deficiency, whatever it might be. This would, at least, have been a fair and candid mode of proceeding, and would have given those who inspected the deed the only information for which it was worth their while to inspect it. But it is urged on behalf of the official liquidator and the directors, that the latter were fully justified in relying upon the guarantee of the partners to make good the deficiency of

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between £2,000,000 and £3,000,000, and a lengthened argument has been entered into on their behalf to shew that the assets of the partners, that their private assets, were sufficient for the purpose, but I am, in the first place, satisfied that they were wholly insufficient, and I think that is conclusively shewn by the fact that of the £2,320,000, at which those assets were estimated, upwards of £1,000,000 consisted of the capital locked up in the *Norwich Bank*, and of the value of the goodwill of that bank, which could not therefore be available in any emergency that might arise. But, even if the assets had been sufficient, no security or lien was taken upon them, but they were left wholly under the control of the owners, and, therefore, exposed to all the perils of bankruptcy and insolvency, to say nothing of the difficulties which might be caused by deaths and other circumstances. This course on the part of the directors I also think wholly inexcusable.

On all these grounds I am of opinion that the course pursued by the directors was most unjustifiable, and that their conduct, however well it may have been meant, amounted to what in this Court is considered fraud. Sitting in this place, I think it right to express my disapprobation of the course adopted. Men who undertake duties so important as these should be made aware that truth should not so be trifled with, but that in commercial, as well as other transactions, it is a duty not to conceal facts from those whose vital interests are involved in their knowledge. Look at the deplorable results which this want of candour has produced in the present case. The shareholders, in consequence of that being concealed from them which they ought to have known, have taken their shares; and the creditors, in consequence of the shareholders taking their shares, have lent their money to the extent of millions; and who can say how many houses have been made desolate in consequence.

It is difficult to say whether the case of the shareholders or that of the creditors is the harder. The former have embarked in the original subscription a million and a half, which must in any event be lost; and they will, by calls, probably have to pay about three millions more, if they are not entitled to the relief sought by these motions; and if they are, the loss must fall on the creditors, who are even more innocent, if possible, than the shareholders.

Take the case of Mr. *Peek*. On the faith of these representations he buys 2,000 shares a few months after the establishment of the company, at premiums averaging about £7 per share, and has therefore paid about £44,000 for his shares, all of which he must lose, and he has also deposited £30,000 in the company.—Then, as to the creditors, take the case of Mr. *Oppenheim*, who deposited £15,000 in the company the day before it stopped payment; and that of Mr. *Stephenson*, who placed £12,000 on deposit with the company a few days only before it stopped. These are grievously hard cases, and very many others equally hard no doubt occurred. It has been argued, on the part of Mr. *Oakes* and Mr. *Peek*, that the prospectus must be considered as the prospectus of the company; and I agree in that view of the case, and if the question had been merely between the company and those gentlemen, I should have had no hesitation in coming to the conclusion that they were entitled to the relief they seek by these motions. And this view of the case is supported by the decisions in *National Exchange Assurance Company* v. *Drew* (1); *Kisch* v. *Central Railway Company of Venezuela* (2); *Blake's Case* (3); and *New Brunswick and Canada Railway &c., Company* v. *Muggeridge* (4), which were cited by the counsel for Mr. *Oakes* and Mr. *Peek*. I think it, however, only an act of justice to the directors to add, that I think their conduct shews that they could not have intended to do wrong, and that what they did was, perhaps, the result of a too sanguine view of the prospects of the concern, and too great a reliance upon the guarantee of the partners; for each of them embarked a large capital in the company, and, though the shares rose to a premium of between £9 and £10, none of them sold any shares, but retained them to the last. This was certainly the strongest evidence they could give of their own faith in the concern, and conclusively shews that what they recommended others to do, they did themselves. But however well meant their conduct may have been, the result is equally unfortunate; and it is conclusively established, by the doctrines of this Court, that a person who misleads another by a misstatement of facts, or the omission to state what he ought to state in a matter upon which the other is about to act, is equally liable for the con-

(1) 2 Macq. 103.
(2) 3 D. J. & S. 122. 11 Jur. N.S. 646.
(3) 34 Beav. 639.
(4) 1 Dr. & Sm. 363. 7 Jur. N.S. 132.

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sequences, whether the misstatement or omission was innocently or guiltily made. In the case of *Rawlins* v. *Wickham* (1), which was frequently referred to in the argument, the representation which was made by Mr. *Wickham* of the solvency of the bank in which he was inducing Mr. *Rawlins* to embark, was assumed by the learned Judges, to have been innocently made, in the belief of its truth, by Mr. *Wickham;* but it nevertheless turned out to be untrue, and the decree of the Court, against his estate after his death, was, that he was bound, to the last farthing, to make good all the loss that Mr. *Rawlins* had sustained by becoming a member of that partnership, because he ought to have known the truth, and, having taken upon himself to state it as a truth, he was just as responsible as if he had made it with a guilty knowledge that what he said was untrue. In the case of *Burrowes* v. *Lock* (2), which is an important authority, there occurs a passage bearing on this case. The trustee of a fund was applied to, to state whether the *cestui que trust* had incumbered it, and he answered that he had not. It turned out that it had been incumbered, and the question was, whether the trustee became liable for the consequences. The trustee said that the reason he made the erroneous statement of its not being incumbered was, that he had forgotten that he had received the notice. Sir *William Grant*, in giving judgment in that case, said, "The only remaining question is that with respect to the trustee. It is objected on his part that this is a demand for damages, and also, that this was not a wilful misrepresentation. As to the first point, the demand is properly made in equity, and the Lord Chancellor (that is, Lord *Eldon*), in *Evans* v. *Bicknell* (3), declared that the case of *Pasley* v. *Freeman* (4), and all others of that class, were more fit for a Court of equity than a Court of law; but his Lordship was clearly of opinion that at least there is a concurrent jurisdiction, and says, 'It has occurred to me, that that case, upon the principles of many decisions in this Court, might have been maintained here, for it is a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that

(1) 4 Jur. N.S. 990; 5 Jur. N.S. 278; 1 Giff. 355; 1 D. G. & J. 304.
(2) 10 Ves. 470-5.
(3) 6 Ves. 174.
(4) 3 T. R. 51.

representation good, if he knows it to be false.' In this case, the Plaintiff was going to deal with *Cartwright* upon a matter of interest, and applied to the person best qualified to give information, the trustee, to know what *Cartwright* was entitled to, who told the Plaintiff expressly that *Cartwright* was entitled to £288, and had an undoubted right to make an assignment to that extent, knowing that he had not a right to make such an assignment, having previously agreed to give another person £10 per cent. out of the fund. There is, therefore, a concurrence of all the circumstances which the Lord Chancellor thinks requisite to raise the equity. The excuse alleged by the trustee is, that though he had received information of the fact, he did not at that time recollect it. But what can the Plaintiff do to make out a case of this kind, but shew, first, that the fact as represented is false; secondly, that the person making the representation had a knowledge of a fact contrary to it. The Plaintiff cannot dive into the secret recesses of his heart, so as to know whether he did or did not recollect the fact, and it is no excuse to say he did not recollect it; at least, it was gross negligence to take upon him to aver, positively and distinctly, that *Cartwright* was entitled to the whole fund, without giving himself the trouble to recollect whether the fact was so or not, without thinking upon the subject. This is a much stronger case than *Hobbs* v. *Norton* (1), and the negligence infinitely greater." The decree of the Court, therefore, was, that a trustee who had innocently made a statement was answerable to the full extent of the loss which the statement had occasioned to the Plaintiff. Assuming, then, that, as between the company and the shareholders only, the latter are entitled to be relieved, it is argued that Mr. *Oakes* and Mr. *Peek* were not members of the company when the order to wind up was made, within the meaning of the 23rd section of the Act of 1862; that the creditors are entitled to look to the company only for payment; and that, though the creditors, when they gave credit to the company, found the names of Mr. *Oakes* and Mr. *Peek*, and the other persons acting with them, published as partners by being inscribed on the register of shareholders, those who saw their names there, were bound to know that every person whose name they saw on the register might have an

(1) 1 Vern. 136.

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equity to be removed, on the ground that he had been fraudulently induced to take shares, or for some other reason; and for such proposition the authorities of *Ship's Case* (1), before the Lords Justices, is relied upon, followed by the decisions in *Stewart's Case* (2), and *Webster's Case* (3). If this, then, be the true view of the law, it must be confessed that it gives a fatal blow to the principles of limited liability as established by the Act of 1862, and the Acts which preceded it. The principle of that Act is, that the liability of the shareholders is limited to the amount unpaid upon their shares; that, in order that the creditors dealing with the company may know what they have to look to, there must be kept in the office of the company a register containing the names and addresses:—[His Honour then read section 25:] and by the 26th section that list must be anually renewed, and by the 32nd section the register must, for a certain time on every day, be open to the inspection of the shareholders gratis, and to the public at large on the payment of a shilling; that charge being obviously imposed for the purpose of preventing the register from being looked at from mere idle curiosity. These are provisions plainly made for the benefit of those persons who may propose to deal with limited companies, and are evidently introduced for the purpose of informing such persons who and what they are to look to in the event of the company becoming indebted to them; and I repeat, it would be a fatal blow to the policy of this Act if persons looking at the register were not entitled to place any reliance upon it, but were bound, as is contended by the present applicants, to take into consideration that all persons appearing on it may have equities to be removed. If I am bound, by authority, to put such a construction on the Act, I must bow to it, however unreasonable I may think the authority; but am I so bound?

Now, the authority which is relied upon for that—*Ship's Case*—which has borne the main stress of the argument upon the authorities, is this: Mr. *Ship*, on the faith of a prospectus which had been issued by a company, applied for shares. I need not state particularly what the objects of the company were; it is sufficient to say that the prospectus proposed eight objects. Mr. *Ship*, on

(1) 2 D. J. & S. 544. (2) Law Rep. 1 Ch. 574. (3) Law Rep. 2 Eq. 741.

the faith of the prospectus, applied for and had shares allotted to him. The company was formed, and carried on its operations for no less than six months. Mr. *Ship*, during those six months, seeing the business going on, which was a business of a general nature, and in strict accordance with the prospectus, never interposed, never took the trouble to ascertain whether the articles of association were in conformity with the prospectus; but the company having gone on, and at the end of six months having come to a failure, and having been wound up, he applied to the Court to have his name removed from the list of contributories, on the ground that he had only agreed to become a member of the company carrying on eight of the objects, and had never agreed to become a member of a company carrying on the remaining two; and on that ground Sir *William Page Wood*, in the first instance, and Lord Justice *Knight Bruce*, and Lord Justice *Turner*, in the second place, confirming the Vice-Chancellor, removed Mr. *Ship's* name from the list of contributories. I intimated, in the course of the argument, that I thought it probable, if that case had originally come before me, I should have arrived at a different conclusion. I have thought over the subject since, and I adhere to that impression, that if I were at liberty to act upon my own opinion, I should not concur in the judgment in *Ship's Case* because it appears to me that it was a duty incumbent on Mr. *Ship*, when he had taken shares in a company, the general objects of which were inconsistent with the business carried on, not to lie by for six months, taking the chance of receiving the profits in the concern, without giving himself the trouble to ascertain what their articles of association were, and that, having taken the chance of making profits during that six months, I should not have thought it competent to him, at the end of that period, to apply to have his name taken off, on the ground that, according to the deed, they had carried their objects further than he originally contemplated. Still, I repeat that the superior Court having decided that question, if the authority had covered these cases, it would have been my duty implicitly to bow to it.

[His Honour here read at length the judgments of Lord Justice *Knight Bruce*, and Lord Justice *Turner*, in *Ship's Case*, and continued :—]

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Now, following out that reasoning, which was urged very much in the course of the argument at the bar, that the meaning of the Act could never be, if a man's name was put on by mistake, or wholly unauthorized by him, that he therefore could be held to be a contributory, it is perfectly plain that no man whose name is on the register in that way could be a contributory. Those are things which are so unlikely to happen, and can happen so seldom, that the Act cannot be affected by any such consideration, and must proceed, according to my view, on the assumption, that a man who has written for shares in the company, allows his name to be put there with his full consent, and, by allowing his name to be put there, is bound as a shareholder as between himself and those who contract with the company. Then, with regard to the cases I have adverted to, I say the same thing occurred in *Stewart's Case* and *Webster's Case*, those being cases of the *Russian Iron Company*, where the only difference was, that while the prospectus proposed to take the ironworks in a particular district—extending over 500,000 acres—the articles of association extended to ironworks in *Russia* generally. The same observations appear to me to be applicable to these cases. The company commenced its operations, it was an iron company, and surely any man who desired to ascertain whether they were going beyond their authority or not, was bound within a reasonable time, by himself or his proper agent, to ascertain what they were doing, and if he chose to allow them to go on under an authority, enabling them to act more extensively, was bound immediately to make an application; and by not having made the application, it appears to me, on the soundest principle, he was bound, as between himself and the creditors of the company at all events, not to object to his name being put on that list. I can only repeat, if the case had been covered by those authorities, it would be my duty to submit, because nothing can be more inconvenient and detrimental to the administration of justice than that a subordinate Court should act in contravention of that which is decided by the superior branches of the jurisdiction.

Now, in the case before me, the applicants had agreed to become members of the identical company established, for objects of which they were well aware, as to which they only say that they never would have agreed to become members if they had known the

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truth, and are consequently entitled to be treated as not having been members at all. The difference is, that in *Ship's Case* there was no contract to become a partner or a shareholder in the concern which was carried on, while in this case there was such a contract, but that it was induced by fraud.

But it is argued by the official liquidator and the creditors that, even assuming the parties moving were induced to take the shares by fraud, they are still liable to the creditors, for that the law is clear that a contract induced by fraud is not void, but voidable only at the option of the party defrauded, and that when avoided it must be so subject to the rights of innocent parties—such parties in the present case being the creditors. The rule that a contract induced by fraud is voidable only at the option of the party defrauded, appears to be grounded on the soundest principles, because it may happen that a contract having such an origin may turn out to be greatly for the advantage of the party entering into it, as, for instance, he may be induced by fraud to enter into a contract to purchase an estate, and if it turn out to be an advantageous contract, notwithstanding the fraud, it is only reasonable that he should retain the estate if he thinks proper. Accordingly, in *White* v. *Garden* (1), it was decided that a contract for the sale of goods obtained by fraud was void only at the option of the vendor, and in *Kingsford* v. *Merry* (2), it was decided that a contract for the purchase of goods induced by fraud, followed by the delivery of possession of the goods, was good till it was disaffirmed by the seller who had been defrauded, and that the title of a transferee of the purchase before the disaffirmance, was good, and though that case was reversed in the Exchequer Chamber (3), it was so on the ground that there was, in fact, no sale of the goods to *Anderson*, to whom they had been transferred. If there had been such a sale, the decision of the Court of Exchequer would have stood. I find that Lord *Chelmsford*, in giving judgment in the case of the *Marie Joseph* (4), takes precisely the same view of the effect of the reversal of that decision by the Exchequer Chamber; and this principle is still more distinctly decided in the *Deposit General Life Assurance Company* v. *Ays-*

(1) 10 C. B. 919.
(2) 11 Ex. 577.
(3) 1 H. & N. 503. 3 Jur. N.S. 68.
(4) Law Rep. 1 P. C. 219, 229.

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cough (1), where it was held by the Court of Queen's Bench that a plea that the Defendant had become a shareholder in the company by the fraud of the Plaintiffs, was bad, because it did not shew that he had ceased to become a shareholder on discovering the fraud. In that case Lord *Campbell*, in delivering the judgment of the Court, said: "It is well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded."

In *Henderson* v. *Royal British Bank* (2), it was decided that it is no defence against a creditor of the company, that the shareholder against whom execution is levied, or sought to be levied, was induced to become a shareholder by the fraud of the company. The language of Lord *Campbell* in delivering the judgment of the Court in that case is so important, and so entirely applicable to the present case, that I think it better to read it. This, it will be remembered, was an application for leave, under the then Act regulating joint-stock companies, for liberty to sue out execution against an individual shareholder of the company, on the ground that the creditor had been unable to obtain satisfaction of his debt out of the assets or property of the company. Lord *Campbell* says, "This was an application for leave to take out execution against a shareholder, and the proposed answer to the application was, that the shareholder for some time had received dividends, and acted in all respects as a shareholder, until the *Royal British Bank* stopped payment, and until its bankruptcy; and he then gave notice that he was no longer a shareholder, and, as far as he could, disaffirmed the contract under which he became a shareholder, as being induced by the fraud of the directors; he demanded back all the moneys he had paid, and, being a depositor himself, he demanded the deposit and all the advances. I may say that nothing could be more gross than the fraud by which he had been induced to take these shares. The question is, whether, if it were established that this fraud had been practised upon him, it could be an answer to this application. If there were any doubt about it, we should not make this rule absolute, but we should direct a *scire facias* to issue, so that the question might be raised on the record. We entertained no doubt on the argument, but being informed that similar applications had been made to the Courts

(1) 6 E. & B. 761. (2) 7 E. & B. 356.

of Common Pleas and Exchequer, and that rules were depending in those Courts, we thought that, upon a matter of this sort, it would be well if we had a conference with the other Judges before our judgment was given, and the Judges are unanimously of opinion that this can be no answer to the application, either upon principle or authority. This is an application by a creditor, who, upon the faith of the party, who then was a shareholder, and who held himself out to the world as a shareholder, being one, gave credit to the bank. He has obtained judgment against the bank. There were no assets of the bank as a company; and the application now is, that execution may issue against that party individually. It would be monstrous to say that, he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares, on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder. It would be monstrous injustice, and contrary to all principle. Whether we could say that with regard to other shareholders privy to the fraud, we need not inquire; there may be some difficulty about that. But that is not the question we have to determine, which is simply, whether there is an answer to a creditor who has given trust upon the faith of his being a shareholder. Suppose this were a common partnership, and that there was credit given to the firm, would it be any answer to an action by the creditor against one of the partners, that the Defendant was fraudulently induced by the other partners to become a partner? *Inter se* that might be considered, but as between the firm and a creditor it is a matter wholly immaterial. Now, the party here admits that he is a shareholder, and acted as such until the bank stopped payment. His name was placed on the register, and remains on the register." Therefore on that broad principle, treating it as monstrous that such a claim could be set up, he decided that it could not be sustained, and execution was allowed to go against the shareholder. We have here the unanimous opinion of all the Judges of *England*, that the circumstance of a registered shareholder having been induced to become such by the fraud of the company, or its directors, is no answer to

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the demand of the creditors of the company; and that decision is conclusive on the question between the shareholders and creditors in the present case, unless the alteration in the state of the law as to the rights of creditors against shareholders since that time has made a difference. What then was the state of the law at that time, and what is it now?

The law at that time, under the 49th and 50th sections of the 7 & 8 Vict. c. 110, required a register of shareholders, which was to be open to inspection; but there was this remarkable difference —that, under the 66th section of that Act, a creditor was at liberty to sue out execution against any individual shareholder, upon satisfying the Court that, after due diligence had been used, he had failed to obtain satisfaction of his judgment against the property and effects of the company; while, under the Act of 1862, the shareholder is protected against any direct proceedings by the creditor, who can get at him merely by means of a winding-up order, the privilege of obtaining which was first given to the creditor by the Limited Liability Acts, which, at the same time that they gave him the right of obtaining such an order, deprived him of the right of proceeding directly against the shareholders of the company. This is a mere alteration of the machinery by which the shareholder is to be reached, and leaves the principle upon which he is to be proceeded against, and the rights of the creditor against him, wholly untouched, except that it limits the amount for which he is liable to the sum remaining unpaid upon his shares. It was observed by Mr. *Mellish*, in his most able argument, that the former state of the law—that is, the law under the 7 & 8 Vict. c. 110—worked unfairly, because it was found that the most wealthy shareholders only were pursued, while the others were left untouched, and it was on this ground that the remedy by a winding-up order was given to the creditor, in order that all shareholders might be made to contribute according to the amount remaining unpaid on their shares.

I am therefore of opinion that there has been no alteration in the principle of the law by the new Acts, but simply an alteration in the machinery by which the shareholders are to be got at, and that the decision in *Henderson* v. *Royal British Bank* (1), is just

(1) 7 E. & B. 356; 3 Jur. N. S. 111

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as much applicable to shareholders under the present Act, as it was to those who were so under the Acts in force when that case was decided in 1857. It must be observed that the decision of the Queen's Bench in that case was followed by the Court of Exchequer in *Daniell* v. *Royal British Bank* (1), and by the Court of Common Pleas in *Powys* v. *Harding* (2).

These decisions are distinct, and bind me to come to the conclusion to which my own judgment, in their absence, would have led me, that whatever may be the rights of Mr. *Oakes* and Mr. *Peek* as against the company, or its directors, they can have no right to be taken off the list of contributories till the whole of the debts of the company shall have been paid.

It was urged by their counsel that this company is not a partnership, but a corporation; but it is, in my opinion, a partnership in every sense of the word, differing from an ordinary partnership in this,—that the partners have a limited liability, and that they are incorporated merely as a rule of convenience on account of the impossibility of carrying on business in the names of so many partners. The term "contributory" is, by the 74th section of the Act of 1862, defined to be "every person liable to contribute to the assets of a company under this Act in the event of the same being wound up." I am of opinion that the assets of the company consist in part of the amount of the calls unpaid by the shareholders; that these two gentlemen are liable to contribute to those assets to the extent of the amount remaining unpaid on the shares until all the debts are paid; and that their motions to be removed from the list must consequently be refused.

With regard to costs, although I feel their case to be a grievously hard one, I am unable to see any ground for relieving them from the payment of the costs occasioned by their motions, which, if I did not order them to pay, would necessarily have to come out of the estate, or that fund which is applicable to pay the debts. The case of the creditors is at least as hard as that of the shareholders, and I cannot, therefore, diminish their funds by the costs of these motions, which must therefore be refused with costs.

As I come to the conclusion that even the original allottees are not entitled to be taken off the list, I have not gone into the dis-

(1) 1 H. & N. 681. (2) 1 C. B. (N. S.) 533.

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tinction between the case of a transferee and an original allottee; but if it had been necessary to go into Mr. *Peek's* case, as distinguished from that of Mr. *Oakes*, *Duranty's Case* (1), *Ex parte Worth* (2), and *Nicol's Case* (3), shew that he would have had great difficulty in sustaining his claim, even if that of Mr. *Oakes* had succeeded.

Mr. *Cole*, Q.C., submitted that Mr. *Oppenheim*, who had been appointed under an order of the Court to represent the interests of the creditors, ought to have his costs.

Sir R. Malins, V.C.:—

I cannot make Mr. *Oakes* and Mr. *Peek* liable for the costs incurred by Mr. *Oppenheim*, but as Vice-Chancellor *Kindersley* made an order that Mr. *Oppenheim* should represent the creditors, and as it appears to me a right thing that the creditors should have a representative, because, although in a certain sense the official liquidators do represent them, still they cannot be expected to have that active interest in their behalf which they would on their own behalf, I think they should have their costs, but they should come out of the estate.

Mr. *Bristowe* asked that the costs of the shareholders who submitted to remain on the register should be paid out of the estate.

Sir R. Malins, V.C.:—

I had some doubts as to the regularity of hearing the parties represented by you, as well as those represented by Mr. *Glasse*, Mr. *Barber*, Mr. *Fry*, and Mr. *Mathew*, but I thought it better, where the interest was so great and so important to the parties, that I should err rather on the side of hearing too many than not enough, but I must treat all these parties as appearing at their own expense. There will be one order only made on these motions. The official liquidators will have their costs from

(1) 26 Beav. 268: 4 Jur. N.S. 1068 (2) 4 Drew. 529: 5 Jur. N.S. 505
(3) 3 De G. & J. 387: 5 Jur. N.S. 265.

the parties moving, and Mr. *Oppenheim* will have his costs, out of the estate.

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Solicitors for Messrs. *Oakes & Peek:* Messrs. *Clarke, Son, & Rawlins.*

Solicitors for the Official Liquidator: Messrs. *Maynard & Co.*

Solicitors for Mr. *Oppenheim:* Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Shareholders, who opposed the motion: Messrs. *Bowker & Peake.*

Solicitors for the Company: Messrs. *Jones, Vallings, & Roberts.*

Solicitors for Mr. *Barclay:* Messrs. *Bevan & Whitting.*

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M. R.
1866
Dec. 12, 13, 14.
1867
Jan. 14.

Will—Charity—Mortmain—Secret Trust—Devise in Joint Tenancy—Implied Assent by one of the Devisees.

A testatrix devised and bequeathed the residue of her real and personal estate, not applicable under her will for the purpose of mortmain, to *A.* and *B.*, his son, as joint tenants. She gave the residue of her property, applicable for the purposes of mortmain, to certain charities mentioned in her will. She died possessed of large property, of which the greater part was realty, or personalty savouring of realty. *A.* was her medical attendant and confidential adviser. On a bill impeaching the devise to *A.* and *B.*, and alleging that the testatrix had intimated her intention of leaving the bulk of her property to charity, and had communicated such intention to *A.*, who had assented to the gift:—

Held (following *Wallgrave* v. *Tebbs* (1)), that, it appearing from the evidence that *A.* was aware of the residuary gift in the lifetime of the testatrix, and that it was intended by her to be applied for charity, and that either by silence or acquiescence he had led her to suppose that it would be so applied, the gift could not be upheld, and *A.* and *B.* were trustees of the property for the Plaintiffs, the co-heiresses at law, and next of kin.

THIS was a suit by the Plaintiffs, some of whom were co-heiresses, and others next of kin of *Caroline Elizabeth Pargeter*, the testatrix, praying that, under the gift of the residue contained in her will to the Defendants, *John Badley* and his son, *James Badley*, they might be declared to be trustees for the Plaintiffs of the realty and mixed personalty thereby devised and bequeathed, on

(1) 2 K. & J. 313.

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the ground that the gift was made to them on a secret trust for charitable purposes.

The testatrix by her will, dated the 8th of August, 1862, after making certain specific and pecuniary devises and bequests, devised her house (in which she resided) and her estate at *Foxcote*, in *Worcestershire*, to *John Badley*, for his life, with remainder to his son, *James Badley*, and his daughter, *Mary Badley*, as tenants in common in fee. She also left property worth considerably more than £500 to *William Brook*, who was indebted to her on a bond for £500. The testatrix gave the residue of her property in these words: "And as to all the rest and residue of my freehold, copyhold, and leasehold property, and all other my real estate, and also all such moneys as may be secured to me upon mortgage of real estates, and all other my property not applicable under this my will for the purposes of mortmain, I give, devise, and bequeath the same to the said *John Badley* and *James Badley*, their heirs, executors, administrators, and assigns, as joint tenants. And as to all my moneys, securities for money, and all other my personal estate and effects applicable under this my will for the purposes of mortmain, except such as I have before disposed of by this my will, and after payment of my debts, &c., I bequeath as follows:" The testatrix then gave several legacies, amounting in the whole to £1000, to charities, and proceeded as follows: "And as to the residue of my said moneys and personal estate, and every part thereof applicable for mortmain as aforesaid, I give and bequeath the same unto the several ministers professing and holding Arian and Unitarian doctrines" (in the places mentioned, upon certain trusts for deserving women never having been married, of fifty-five years of age and upwards); "and I direct that the moneys hereinbefore given shall not be raised from securities consisting of real property or chattels real, but be wholly supplied from personal property of such a character as shall be consistent with the law and statutes of the realm against mortmain": and she directed the moneys so bequeathed to be called "*Thomas Pargeter's* Charity."

The testatrix appointed *William Brook* and his wife, *Thomas Laister*, and *Brooke Robinson* to be executors and executrix of her will.

The testatrix died, at *Foxcote*, on the 26th of April, 1864, at the age of sixty-three, without having been married, and the will was proved in June following. She had no near relations. The Plaintiffs were her cousins and next of kin, and three of them were her co-heiresses at law.

The testatrix died seised and possessed of real estate of very great value besides that specifically devised, and possessed of a large amount of personalty besides that specifically bequeathed, consisting as well of pure personalty applicable to charitable bequests as of mixed personalty not so applicable. The testatrix was an Arian or Unitarian in her religious profession, and had during her lifetime given away large sums of money to the charitable institutions in her neighbourhood.

The Defendant *John Badley* resided at *Dudley*, about six miles from *Foxcote*, and had been for many years the regular medical attendant of the testatrix and her confidential adviser, and had, as the bill alleged, obtained great influence over her.

The material statements and allegations in the bill were, in substance, as follows:—

That soon after the death of the father of the testatrix, *John Badley* introduced to her a lady in the neighbourhood named *Mary Purton*, who became her companion and confidential friend; that the testatrix was of a retiring and nervous temperament, and after the death of her father lived at *Foxcote*, a retired country place, and saw few persons except *John Badley* and *Mary Purton*, who were her only confidential advisers.

That about the year 1853 the testatrix applied to *John Badley* to recommend her a solicitor to prepare her will, which had been a matter of conversation between her and *John Badley* and *Mary Purton*, to whom the testatrix had mentioned a scheme she had formed of giving the bulk of her property to elderly decayed gentlewomen; and that he recommended as a solicitor *William Robinson*, of *Dudley*, father of *Brooke Robinson*, one of the Defendants.

That shortly afterwards she had an interview with *William Robinson*, and instructed him to prepare her will, which, after specific devises and bequests to relations and friends, was to contain a devise of her *Foxcote* estate to *Mary Purton* for life, with remainder to *John Badley* for life, with remainder to his two

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daughters as tenants in common in fee, and directed him to give the whole of her residue, both real and personal, towards founding a charity for decayed gentlewomen, to be called *Thomas Pargeter's* Charity; that he explained to her that real estate, or personal estate savouring of realty, could not be given for such a purpose; but told her that she might effect her object by devising it to friends in whom she had confidence, and telling them privately her wishes, but that it would not be obligatory on them to carry those wishes out; that she took time to consider this, and subsequently directed him to leave the residue to *Mary Purton*, with a blank for another name, as joint tenants; and that the blank in the draft was ultimately filled up with the name of *John Badley*.

That the testatrix executed her will in 1854, and, as the bill alleged, *John Badley* and *Mary Purton* assented to their names being used for the purposes of the proposed charity.

The residuary clause in that will, as it stood in the second draft, was as follows: "As to all the rest and residue of my real estate, and also of all such moneys as may be secured to me on mortgage of real estate, and of all other my property not strictly in the nature of personal property, I give and devise the same to the said *Mary Purton* and to [blank], their heirs and assigns, as joint tenants."

In 1856, the testatrix made another will, the draft of which contained a residuary gift similar to that of 1854, with this difference, that, after the words "not strictly in the nature of personal property," these words were first added, but afterwards struck out, "applicable for charitable purposes," and the names of the residuary devisees were as follows: "to the said *Mary Purton*, the said *John Badley*, and his son, *James Badley*, their heirs and assigns, as joint tenants."

Mary Purton died in 1856. In 1862, the testatrix applied to *Brooke Robinson*, an attorney, and the son of *William Robinson* (who had retired from practice), to alter her will; the name of *Mary Purton* was omitted, and the residuary devise was made to *John Badley* and his son, as joint tenants, as before stated. This will was the subject of the present suit.

The bill alleged that the gift of the bulk of the property of the

testatrix for charitable purposes was a frequent subject of conversation between her and *John Badley* to the time of her death, and that it had been admitted by the devisees after her death that the bulk of her property was so left. The bill charged that the residuary gift to the Defendants *John Badley* and *James Badley*, as joint tenants, was for charitable purposes, which they agreed to perform, and prayed that it might be declared void, or that it might be declared that the said Defendants were trustees as to the real estate for the Plaintiffs, the co-heiresses at law of the testatrix, and as to the personal estate savouring of realty, for the Plaintiffs, who were her next of kin. The executors were also made Defendants.

In support of the Plaintiffs' case, a considerable amount of evidence was adduced. The affidavit of *William Robinson* contained the following statement respecting the wills executed by the testatrix in 1854 and 1856, and his previous communications with her:—

"In consequence of her having expressed a desire to give the whole of her residue, including real and personal, to charity, I explained to her the law. I was not then aware that she possessed an acre of land beyond what she had specifically devised. I knew she had moneys invested on tolls, canal shares, and a mortgage or two. I explained the law to her by telling her that any moneys invested on property comprising real estate, could not go to charity, and that she had better call in those moneys, or else execute a deed in her lifetime, according to the *Mortmain Act*. She strongly objected to execute the deed on the ground that it would become known, and she did not like, apparently, to call in the moneys. I told her she might effect her object by devising and bequeathing her realty and mixed personalty to a friend or friends, I cannot tell which, in whom she had confidence, and telling them privately what she wished done with it, or write them a note, but it would be by no means obligatory on them to do it. They might keep it themselves if they liked. She gave me no answer, but did not seem to approve of the plan. She hesitated, as if she would consider further upon it. She was the most shy and nervous person I ever met with. It was difficult to ascertain what she meant or wished to do. She was timid as to what she was doing, whether it might be wrong. It appeared to

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me she hardly dared to do anything. I may have told Miss *Pargeter* to consult Mr. *Badley* on some points of the will, but I think not as to the residue. I am not sure that I ever did tell her to consult Mr. *Badley*. She left me, and saw me subsequently, and directed me to prepare the draft of the will, leaving the residue of the realty and mixed personalty to Miss *Purton*, which I did. Subsequently I received instructions from her to leave the residuary mixed estate to Miss *Purton* and some other person, leaving a blank for the name. I believe she subsequently instructed me to fill up the blank with the name of *John Badley*. The will was executed shortly after by Miss *Pargeter* (her mixed residuary estate being left to the said Miss *Purton* and *John Badley* as joint tenants) in 1854 in the presence of two witnesses and myself, the testatrix and witnesses being all present at the same time. When she told me to insert the name of *John Badley* with Miss *Purton* as residuary legatees and devisees, she said, 'Oh! she supposed they would do what was right.' I know that she had the greatest confidence in Mr. *Badley* and Miss *Purton*, and entertained a greater regard for them than any other people. In 1856, Miss *Pargeter* directed me to make some alterations in her will, in respect of some of the specific devises and bequests. I pointed out to her that if she wished the moneys to go in charity which were invested in those securities, she had better call them in and invest them in the funds. She declined doing so. She said she should like *James Badley's* name inserted as a residuary devisee and legatee, in addition to the names of Miss *Purton* and *John Badley*, as she thought *John Badley* would think it a compliment. I had the impression from the original instructions that anything she had not specifically devised was to go in charity, but she never afterwards expressed the slightest anxiety that the residuary real and mixed estate should go in charity. She said nothing one way or the other, after her first instructions."

The deponent afterwards stated: "I put in the words 'joint tenants,' because I thought at that time all the residue was to go in charity. My opinion then candidly was that Miss *Pargeter* intended the whole of the residue to go in charity, but I have since changed my opinion on that subject for the reason that she would not call in the moneys secured on real estate, and next, that

she had the opportunity of selling some land, which I found had not been specifically devised, at the fair market price of the day, but which she objected to sell at."

He afterwards stated that the testatrix never told him that she wished her residuary devisees to add their residuary property to the charity for distressed gentlewomen, or to any other charity.

The Rev. *William Cochrane*, who was minister of the chapel at which the testatrix attended, made the following affidavit:—

"I have been minister of the chapel for nearly sixteen years. The testatrix was, during that period, until her death, a member of my congregation. She gave considerable sums of money for educational purposes, and, at her own expense, built some new schools on her own land. From a conversation she had with me, in the year 1863, I was led to believe that all her residuary landed and other property, after making provisions for her relations and friends, was to be applied to charitable purposes. She had the greatest confidence in the Defendant, *John Badley*, and I believe he had very great influence with her. She declined on one occasion to give me a reply to a question I asked her about our *Netherend School* till she had consulted Mr. *Badley*, on the ground that she had no other person to advise with."

At the hearing of the cause, this witness was cross-examined on his affidavit, and after stating that, in the autumn or winter of 1863, after he had been speaking to the testatrix about making a trust deed for the *Careless Green School*, added, "She told me she found she could not leave by will landed property for charitable purposes, that she had been consulting her solicitor on that point, and he had told her so; and she said then, that, after leaving a few fields of land and a few legacies to her relatives and personal friends, then all the remainder of her property would go to charitable purposes, and not to enrich any one family."

On re-examination the same witness stated:—

"She (the testatrix) told me, in speaking of the trust deed for the *Careless Green School*, that she could only leave the property by a trust deed; in other words, that she could not leave it by will, for charitable purposes; that she had just been consulting her solicitor on a matter of far greater moment and importance,

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that was in relation to other landed property, and that her solicitor told her that there were but two ways of doing it; one I have mentioned, the other, she said, was, that if she had any particular friend in whom she could place confidence, she might leave it with him, if she had sufficient faith in him that he would carry out her intentions after her death.

"I said it was a great responsibility for any man to take upon himself, and a very great temptation for her to throw in the way of any person. She said she thought she had one friend on whom she could rely, and that friend, she told me, was Mr. *Badley*."

He further stated, "I recollect Mr. *James Badley*, either before or after the funeral, saying to me, that he and his father would be very willing to carry out any well authenticated intention that Miss *Pargeter* had ever expressed." He also stated, "They" (the Defendants) "asked me the sum of money that would be required, or that I thought Miss *Pargeter* would have given, if living" (to a particular charity). "I told them £500, and they at once acceded to my wish."

Thomas Laister, and *Sophia*, his wife, who were well acquainted with the testatrix, and lived near her, made an affidavit, of which the following are the material passages, relating to the execution of her last will:—

"On the 8th of August, 1862, we called for the testatrix, to take her in our carriage to *Dudley*. She took with her a small brown paper parcel. She was undecided whether she should be driven to *John Badley's* house, or to *Brooke Robinson's*, both of whom lived at *Dudley*. She told me (*Sophia Laister*) that she was desirous of going to *John Badley's* first, and that she wanted to consult him upon business, for which he would not be paid, and she at last decided to be driven to *John Badley's*. She then went into his house with the parcel in her hand, and we left her there between eleven and twelve o'clock. We went to Mr. *Badley's* about five o'clock to find her. She brought out a brown paper parcel similar to that she took with her in the morning, but after she had taken her seat in our carriage she turned to Mr. *Badley* and said to him, 'I will, or had better, leave this' (meaning the parcel) 'with you,' and he said, 'Very well,' and took it

from her; and she said to him, 'You really do think it is all right? and *John Badley* bowed, signifying, as I thought, an assent.

"I (*Thomas Laister*) attended the funeral of Miss *Pargeter*. After the funeral, *Brooke Robinson* read over the will. The residuary gift to *John Badley* and *James Badley* was then mentioned as being left to them for charitable purposes, and it was the subject of conversation with the persons then present."

The following passages are from the affidavit of *William Brook*, the steward of the testatrix:—

"*John Badley* was the only person whom she generally consulted on her private affairs with the exception of *Mary Purton*. At one time she wished to sell all her real property, and, in particular, she spoke of then selling her *Herefordshire* estates, which are extensive, and form part of the residuary real estate. She told me she had consulted Mr. *Badley* upon selling them, who told her not to annoy herself about the disposal of her property, but to let it be as it was. I mentioned to Mr. *Badley* that I was bound to Miss *Pargeter* for £500, lent by her to me for my brother's use. I asked him to speak to her to provide for its payment by her will, so that I should not be called upon in case of her death to pay it at once. I told him it would ruin me if that were to be the case. Mr. *Badley* told me, in reply, that the testatrix had made her will, and provided for it. He also then told me that, after providing for her relatives, she had given the bulk of her property to charity. I have a distinct recollection of the conversation."

This witness afterwards made the following statement respecting the conversation after the funeral of the testatrix:—

"I attended the funeral of the testatrix. After the funeral, and on the same day, *Brooke Robinson* read over the will of the testatrix, in the presence of all those persons who attended her funeral, and then stated, as I understood him to say, that the residuary estate left to *John Badley* and *James Badley*, was left to them for charitable purposes. This gift for charitable purposes was the subject of conversation by the persons then present, and it was then mentioned as being of very great value. *James Badley* was present at this conversation, and must have heard what passed,

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but he did not, in my hearing, question such disposition of the estate, or the value thereof."

The Defendant, *Brooke Robinson*, in his answer, stated that *James Badley* was informed by him after the death of the testatrix, and before the will was read, of the general nature of the will, and particularly of the residuary devise and bequest.

Thomas Henry Pargeter, who was present at the funeral, made the following statement in his affidavit, that *John Badley* told him before the funeral that the testatrix had left him a few fields at *Foxcote*, and her estates at *Kidderminster* to *W. Brook*; and added, "I attended the funeral. *James Badley* said that it might appear strange, but that he had never been at *Foxcote* before. After the funeral was over, and on the same day, *Brooke Robinson* read the will of the testatrix, in the presence of the relatives and the other persons last-named. He then stated that the residuary estate given to the Mr. *Badleys* (meaning *John Badley* and *James Badley*) was left to them for charitable purposes. The amount of this residuary gift was stated to be very large. *James Badley* was present when *Brooke Robinson* made his statement as to the residuary estate being for charity, and at the conversation as to its value, and did not dissent from the said statements."

Other witnesses gave evidence of a similar character as to what passed at the funeral.

There was a considerable amount of other evidence, especially as to the feeling of the testatrix towards her relations.

The Defendants, *John Badley*, and *James Badley*, put in their answer, of which the following are the most material passages:—

Par. 6. The testatrix never at any time, directly or indirectly, expressed to me (*John Badley*) any intention of leaving me any other property (except on one occasion her house at *Foxcote*). She once asked me to be executor to her will, which I declined, and she then asked me if I would object to my son being appointed executor, but I declined on his behalf.

Par. 10. The testatrix, on several occasions during her life-time, mentioned to me (*John Badley*) in conversation, a desire to set apart a sum to establish some charity for decayed gentle-women as hereinbefore mentioned; but she never stated to me, or

(save as might be inferred from the expression of such desire) led me to believe that she had come to, or made, any definite arrangement on the subject, and she never said anything as to what sum she desired to dispose of for that purpose, or any particulars with reference thereto; and, save as aforesaid, I, *John Badley*, deny, and I, *James Badley*, believe the denial to be true, that the testatrix often, or occasionally, or ever, talked with me, *John Badley*, on the subject of her wish to dispose of her property, or any part thereof, for charitable purposes; and I absolutely deny that she ever wrote to me on the subject of her wish.

Par. 30. We absolutely deny that the residuary real and personal property left by the said will to *John Badley* and *James Badley*, as joint tenants, was given to us for charitable purposes, which we promised or agreed with the said testatrix to perform, and, on the contrary, we say, and humbly insist, that such property is, to all intents and purposes, our own, to be applied and dealt with by us as in our discretion we think fit. I, *John Badley*, for myself say, and I, *James Badley*, believe it to be true, that I have for many years been in the habit of giving a large sum annually to charitable purposes; and we, these Defendants, think it likely that we shall devote, and in fact intend to devote, a portion of the income arising from the property coming to us under the will of *Caroline Elizabeth Pargeter*, in like manner, and we believe that in the end the modes in which, in the exercise of our discretion, we shall eventually determine to dispose of such portion of the said income, may and will, in the main, be in accordance with the views and feelings entertained by *Caroline Elizabeth Pargeter*, when living, but we absolutely deny that we are under any obligation so to do, or that we, or either of us, directly or indirectly, promised, agreed, or consented to or with the said testatrix, to perform or execute any trusts for charitable purposes, or to apply the said property, or the income thereof, or any part thereof respectively, for any charitable purposes whatsoever, or that we, or either of us, were, or was, ever asked or applied to, or received any communication from the said testatrix on such a subject, and we say that if we had been asked or applied to by the testatrix to be named in her will for charitable, or any trusts, we should have declined to accept any such devise or bequest.

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The Defendants afterwards put in a voluntary answer, in which they stated, "I, *John Badley*, deny, and I, *James Badley*, believe the denial to be true, that the disposition of the bulk of the testatrix's property towards the support of those whom she called decayed gentlewomen, was the subject of repeated or (save as in our former answer mentioned) any conversation between the testatrix and me, either before or after the date of what is called the 1854 will, or up to the time of her death, or, so far as I ever knew or heard, between her and *Mary Purton*, and I deny that she ever intimated to me that she had left any part of her residuary property, which she could not openly leave for charitable purposes, to me and *Mary Purton*, or either of us, with a view of its being so applied.

"We deny that we, or either of us, ever promised or agreed to perform any charitable trust in regard to any property left or intended to be left to us, or either of us, upon trusts, the nature of which were not declared by the testatrix; and we claim to hold all property, in fact, given to us by her will, free from any trusts whatever."

Mr. *Selwyn*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Sargant*, for the Plaintiffs:—

We contend that it is clear from the frame of the will, and from the conduct of the testatrix, as shewn by the evidence, that she intended to leave the residue of her property to charity.

The devise of the residue to *John Badley* and his son, as joint tenants, is in itself a presumption of an intention to create a trust. This was laid down in *Saltmarsh* v. *Barrett* (1), where Lord Justice *Turner* observed that the gift in the will in question being in joint tenancy, was in itself an indication of a trust. An intimation to one or both of the devisees by a testator of his intention, and his or their acquiescence in it, is sufficient to constitute a secret trust. Thus, in *Russell* v. *Jackson* (2), where there was a devise of residuary estate to two persons, with an oral intimation by the testator to one, if not both, of the devisees, that the testator had confidence in them, and was satisfied they would carry out his intentions, which they well knew, an assent by one of them to

(1) 3 D. F. & J. 279; 7 Jur. (N.S.) 814. (2) 10 Hare, 204.

this intimation was held to amount to an undertaking on his part to carry out such intention, and to a secret trust, and, the object being one which was either charitable or illegal, the gift as to the real estate was declared to be void.

In the present case it is clear from the evidence that the testatrix communicated her intention to *Mary Purton*, who was one of the devisees under her first will, and also to *John Badley*. Where there is a devise to two, and an oral intimation to one, who assents to the testator's object and intention, and leads the testator to suppose that he assents, that is sufficient, without any formal undertaking.

The principle on which a secret trust for a charity of real estate is void in law is thus stated by Mr. Justice *Bayley*, in *Doe* v. *Wrighte* (1): "The statute makes void not merely the trust but also the legal estate given; for, if that were not so, a party might consider himself bound in honour, though not in law, to convey the estate to the uses prohibited." In *Moss* v. *Cooper* (2), the testator's wishes were conveyed to the devisees of his residue by a third party, and, there being *primâ facie* evidence that the communication was authorized by the testator, the devisees were not allowed to take for their own benefit. It was considered in that case that it was not necessary for a bargain to be entered into before the execution of the will. *Tee* v. *Ferris* (3) was a case of a gift to devisees as tenants in common, to one of whom the testator's intention was communicated, and his silence was held to be equivalent to an undertaking to carry it into effect; but it was also held that the other devisees, being tenants in common, were not affected by the communication to one.

In *Wallgrave* v. *Tebbs* (4), although the gift to the devisees was upheld, yet the principles laid down by Vice-Chancellor *Wood* are applicable to the present case, for His Honour observes, that "where a person, knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a

(1) 2 B. & A. 710, 721.
(2) 1 J. & H. 352.
(3) 2 K. & J. 357, 2 Jur. N.S. 807
(4) Ibid. 313, 321; 2 Jur. N.S. 103

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case of trust." It is not, therefore, necessary that there should be an actual bargain or undertaking entered into before the execution of the will.

In the Defendants' answer in the present case, although they deny that the residue was given to them for charitable purposes, which they promised or agreed with the testatrix to perform, yet they make this admission, "we think it likely that we shall devote, and, in fact, intend to devote, a portion of the income arising from the property coming to us under the will in like manner" (*i.e.* to charitable purposes), "and we believe that in the end the modes in which, in the exercise of our discretion, we shall eventually determine to dispose of such portion of the income, may and will, in the main, be in accordance with the views and feelings entertained by the said *Caroline Pargeter* when living." This admission is sufficient, having regard to the other facts deposed to in the evidence, to bring the case within the authorities, and the object being one which the law would not allow the testatrix to do directly, the Court will not permit it to be accomplished indirectly. According to Mr. *Cochrane's* evidence, she had expressed to him her intention that the bulk of her property was to go in charity, and not to enrich any one family; he also deposes to the fact that one of the Defendants had expressed to him their wish to carry into effect any well authenticated wish of the testatrix. On the whole case, we submit that *John Badley* was well aware of the testatrix's intention, and led her to understand that he would carry it into effect; that the devise is void in law, or that the Defendants must be declared trustees for the Plaintiffs' benefit.

Sir *Roundell Palmer*, Q.C., and Mr. *F. C. J. Millar*, for the Defendants, *John Badley* and *James Badley*:—

Where a testator, whatever be the wish or intention of his own mind, makes an absolute gift of real or personal estate to a person named in his will, without expressing his wish or intention to such devisee or legatee in such a manner as would be held to be binding upon him, then he takes the gift absolutely. He is under no obligation to perform wishes that are extrinsic to the will. It is an imperfect obligation, which the law neither prohibits nor sanctions. If, during the testator's life, he never accepted any trust, the Court

is not called upon to interfere, though, if any well authenticated wish or intention of the testator comes to his knowledge after the testator's death, it is probable that he may give effect to it. But, whatever his feeling or intention, he is entitled to stand upon his rights, both at law and in equity, as regards the gift under the will. In the case of *Russell* v. *Jackson* (1), it was clearly proved that the intentions of the testator had been communicated to one of the devisees. Where the trust is one which would have attached to the gift if it were not intercepted by the law of mortmain, and which the Court would have carried into effect, then the Court will, if the trust falls within the *Statute of Mortmain*, set aside the gift. It is on this principle that *Tee* v. *Ferris* (2), was decided.

In *Wallgrave* v. *Tebbs* (3), the testator devised real estate to *Tebbs* and *Martin* as joint tenants, and a bill was filed against them by the heir-at-law to impeach the gift. The Defendants denied that they had ever had any communication with the testator on the subject of his intention, and said that they knew nothing of his intentions till after his death. The testator had written a letter, which was never signed, expressing his general confidence in the Defendants as to their application of the property. There Vice-Chancellor *Wood* upheld the devise, and observed (4): "I have anxiously considered this case, and the more so, because I do not find that there is any authority by which the point is decided. In *Russell* v. *Jackson* (5), Lord Justice *Turner*, then Vice-Chancellor, expressly guards himself from being supposed to give any opinion upon the question now raised. But although I do not find any decision in point, I find in *Adlington* v. *Cann* (6), a clear indication of the opinion which Lord *Hardwicke* would have entertained upon a question like the present; and in *Muckleston* v. *Brown* (7), I find an equally clear indication that the same view would have been taken by Lord *Eldon*." His Honour then stated the test by which a secret trust was to be determined.

According to the principles there laid down, there are three conditions necessary to raise a case of trust; first, that the person

(1) 10 Hare, 204.
(2) 2 K. & J. 357.
(3) Ibid. 313.
(4) 2 K. & J. 321.
(5) 10 Hare, 204, 210.
(6) 3 Atk. 141.
(7) 6 Ves. 52.

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knows that the testator is making a disposition in his own favour; secondly, that he knows that the testator intended it for purposes other than for his own benefit; thirdly, that the testator has communicated that intention to the person taking under that devise, to which the devisee has assented. On the other hand, if the testator abstains from making such a communication, then no trust will attach. In *Wallgrave* v. *Tebbs* (1), it was clear what the intentions of the testator were, but they had not been communicated to the devisees. *Tee* v. *Ferris* (2), was decided on the same principle, but there the testator's intention was plain, and communication to one of the devisees was clearly proved.

In *Lomax* v. *Ripley* (3) the Court refused to set aside the will of a testator who left the whole of his residuary real and personal estate to his wife in the hope that she would give effect to his desire, but declared no trust. That was a stronger case than the present one, for the intention of the testator to leave the bulk of his property to charity had been a frequent subject of conversation between himself and his wife, and she had expressed her approbation of such a disposition, but she had not directly or indirectly entered into any engagement to devote the property to that purpose. There, though she intended to carry out her husband's wishes, the gift was upheld.

Moss v. *Cooper* (4) turned on a question of fact, and not on principle. The wishes of the testator, and communication to the devisee were clearly proved, and the only question was, whether the person making the communication was authorized by the testator.

The facts of the present case are very simple. The evidence of the Defendant *John Badley*, as to the fact of no communication having been made by the testatrix, is borne out by the evidence of Mr. *Cochrane*, for the statement made to him by the testatrix is quite inconsistent with any undertaking on the part of *John Badley* to give effect to her intention. All the other evidence is reconcilable with the statement in the answer that they had never received any communication from the testatrix of her intention of leaving the residue to them, with a view to its being applied for

(1) 2 K. & J. 313; 2 Jur. N.S. 1103
(2) Ibid. 357; 2 Jur. N.S. 1007
(3) 3 Sm. & Giff. 48; 1 Jur. N.S. 272
(4) 1 J. & H. 352.

purposes of charity, and that they were under no obligation to do so. Under these circumstances, the gift must be upheld, and the Defendants, *John Badley* and his son, be held to take the residue for their own benefit. M. R. 1866-7 JONES v. BADLEY

Mr. *Baggallay*, Q.C., and Mr. *Peck*, for the executors.

Mr. *Selwyn*, in reply.

Jan. 14. LORD ROMILLY, M.R. :— 1867

This suit is instituted by the co-heiresses at law and next of kin of a single lady of the name of *Caroline Elizabeth Pargeter*, the testatrix, praying that under the gift of the residue contained in her will to the Defendants, *John Badley*, and his son, *James Badley*, they may be declared to be trustees for the Plaintiffs, on the ground that the gift was made to them in trust that the real estate and mixed personalty so given should be applied for charitable purposes.

The testatrix was a single lady, possessed of a very large fortune, with few tastes, and none of them expensive, of a very nervous and timid disposition, and of infirm health, and somewhat apprehensive about herself. She had several relations, with whom she had more or less of intercourse. She was cordial with none of them, she had quarrelled with none of them, and seems not to have liked or disliked them in any marked manner. She was most intimate with the Defendant, Mr. *John Badley*, who was, at the time of her death, and had been for many years, her medical adviser, and who was the person whom she principally consulted, and on whom she placed the greatest reliance. She died in April, 1864, at the age of sixty-three.

She had previously made her will, in August, 1862, revoking all previous wills. By it she gave property to the value of about £70,000 to relatives and friends, and she gave the residue of all her real estate, and all moneys secured on mortgage of real estate, and all the rest of her property not applicable under her will for purposes of mortmain, to Mr. *John Badley* and his son, the two

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first Defendants on the record, as joint tenants in fee simple, and as to all the residue of her personal estate applicable to the purposes of mortmain, she gave it for certain specified and charitable purposes, and all the remainder of it to the ministers officiating as Unitarian or Arian ministers at the places mentioned in her will for the purpose in the will stated. The amount of the pure personalty so bequeathed is estimated at £60,000, and the residue, devised and bequeathed to Mr. *John Badley* and his son, is estimated to be of the further value of £116,000.

The Plaintiffs allege that this devise and bequest was made on the faith that the property so given should be applied for charitable purposes. This is denied by the Defendants, and this is the issue to be determined in the cause. For this purpose a minute examination of the evidence is necessary. It must also always be borne in mind that the burthen of proof lies upon the Plaintiffs, and that it is for them to make out the affirmative of this proposition.

The law upon this subject appears to me to be very accurately and very comprehensively stated in the case of *Wallgrave* v. *Tebbs* (1): "Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and in such case, the Court will not allow the devisee to set up the *Statute of Frauds*, or, rather, the *Statute of Wills*, by which the *Statute of Frauds* is now, in this respect, superseded; and for this reason,—the devisee by his conduct has induced the testator to leave him the property; and, as Lord Justice *Turner* says in *Russell* v. *Jackson* (2), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will. But in this the Court does not violate the spirit of the statutes; but for the same end, namely, prevention of fraud, it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it."

(1) 2 K. & J. 313, 321; (2) 10 Hare, 204.

In my opinion, it is by this standard that I must test the evidence. Does it prove the proposition here stated? that is, that the Defendant, knowing that the testatrix intended to make a disposition in his favour, to be applied for purposes other than his own benefit, either expressly promised, or by silence implied, that he would carry the testatrix's intention into effect? In order to do so, two things are to be made out: first, that the testatrix, by this disposition of her residue, intended that it should be applied for charitable purposes; and, secondly, that the Defendant, Mr. *John Badley*, induced her to believe that he would so apply it.

In order to establish the former of these propositions, evidence, both documentary and oral, is adduced. The documentary evidence consists principally of the form of the will, and the disposition of the residue contained in the will itself, and also of two former wills made by her. The oral evidence consists of representations made by her respecting her property to various persons. The form of the will, and of the residuary disposition, is very important. [His Lordship then stated the provisions of the will, and the residuary gift.]

It is argued with considerable force that the circumstance of the residue being given to Mr. *Badley* and his son as joint tenants is indicative of a trust; and the more so, as it is to be observed that where she makes a devise admittedly for their benefit, the limitation is to Mr. *Badley* for his life, and after his death to his son and daughter as tenants in common. This circumstance has, in several cases, justly been considered as constituting an element of importance in the determination of this question; and additional weight is given to this form of bequest from this circumstance, that she adopted the same course in 1854, and in 1856, when she made two previous wills, the drafts of both of which are produced. At that time the testatrix was very intimate with a lady of the name of *Mary Purton*, in whom she placed much confidence. In the draft of the will of 1854, she gave this lady gifts for her own exclusive benefit; and then she gave the residue in these words:— [His Lordship then read the residuary gift in the draft will of 1854.] It is argued that, at this time, it is conclusive that the devise was not intended to be a beneficial one to the devisees, as if so, she could not have left the name of the other person in blank,

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to be filled up only when a fit person could be obtained to undertake the purposes of the testatrix. In the draft of the will of 1856, the same mode of disposing of the residue is noticeable, with this difference, that after the words, "not strictly in the nature of personal property," the four following words were originally written and then struck out, viz., "applicable for charitable purposes," and also that the blank left in the former draft is supplied, and the devise is made "to the said *Mary Purton*, the said *John Badley*, and his son *James Badley*, their heirs and assigns, as joint tenants." In this will, also, there was a previous devise to Mr. *John Badley* for life, with remainder to his two daughters as tenants in common in fee simple. At the end of the year 1856, *Mary Purton* died, so that the devise to her was necessarily omitted in the will which the testatrix subsequently made in August, 1862. Although I could not act upon this alone, I should from this circumstance, if confirmed by other circumstances, be disposed to think that the testatrix did not intend the disposal of the residue of the estate to be for the personal benefit of the persons who are mentioned therein as devisees and legatees.

The concurrent oral testimony to corroborate this is very strong. Mr. *William Robinson*, her solicitor, who prepared the former wills states:—[His Lordship then read portions of his evidence, before stated.]

I am scarcely disposed to attribute so much weight to the circumstances mentioned by Mr. *Robinson*, as he is disposed to do, as indicative of an alteration of that intention; for, if she believed that she could trust her residuary devisees, the alteration in the character of a small piece of property was really immaterial. [His Lordship then read portions of the affidavit and cross-examination of the Rev. *William Cochrane*.]

I consider Mr. *Cochrane* to be a witness above all exception; and, after this, coupled with the facts and evidence I have stated, I think it impossible not to come to the conclusion that the testatrix believed that she had given the whole of her residuary property in trust to be employed in charitable purposes. This is also confirmed by the evidence as to what took place at the time of the funeral.

A great deal of the evidence goes to the question as to the

feeling entertained by the testatrix towards her relatives. This it is unnecessary to examine here in any detail. In my opinion, it fully establishes what Mr. *Cochrane* states in his evidence, which amounts to this, that the testatrix was a remarkably timid, nervous person, who preferred living in seclusion, who had no dislike to her relations, though she had no very cordial feelings towards them; but was frequently in the habit of seeing some of them, and never refused to do so when her health, which was infirm, permitted it.

This point being, in my opinion, established by the evidence, namely, that the testatrix intended to give the whole of her residuary estate for charitable purposes, and that she believed she had secured the accomplishment of that object by leaving it to Mr. *Badley*, and his son, as joint tenants, the next question is, whether the evidence establishes that those gentlemen, or either of them, by any act or promise of theirs, or either of theirs, or, to apply the principle of *Wallgrave* v. *Tebbs* (1), by silent acquiescence in her wishes, induced her to believe that they would so employ it? Without this, it is impossible to fix any trust upon them. With respect to the son, *James Badley*, the case may be dismissed at once. He was not intimate with the testatrix; he rarely saw her except when she visited his father; he scarcely, if ever, conversed with her; and it is established that he never was at *Foxcote*, her residence, until the day of the funeral. It is true that she gave him an estate in reversion, after the decease of his father, in one half of the *Foxcote* property, the other half being given to his sister. But this form of devise was, I think, intended as a benefit to the father, Mr. *John Badley*, who, being much older than the testatrix, it was possible, if not highly probable, that he would predecease her, and thus defeat the benefit intended for his family if the devise had been to him absolutely. It is true that, to some extent, the same observations might apply to the disposition of the residue, but against this it is urged, that the sister is omitted from the devise, and that, assuming the testatrix believed that she could trust in Mr. *Badley*, the union of his son in the trust with him is to be ascribed to the desire of joining in the trust a person whom his father would influence to carry her wishes into execu-

(1) 2 K. & J. 321, 2 Jur. (N.S.) 803

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tion, and that, with her habits of seclusion and nervous timidity, she would be indisposed to reveal her intentions to any other person. The evidence respecting Mr. *Badley*, as to whether, if at all, he had induced her to believe that she might trust him, may be stated thus: In the first place it is proved conclusively that he was the person in whom she reposed the greatest confidence, and that she consulted him respecting not only her health, but all her worldly affairs.

The next question to be examined into is, whether the testatrix had consulted Mr. *Badley* respecting her will, or had communicated to him the contents of it, or the general character of it. I think the evidence establishes that she did at least communicate to him the contents of her will. The evidence of Mr. and Mrs. *Laister* as to what took place on the day when she executed her will, is, in my opinion, only intelligible on the supposition that she consulted him as to the disposition she had made of it by her will. [His Lordship then read their evidence, before stated.]

It is attempted to get rid of the part of the evidence about the £500 bond, by shewing that the testatrix did not by her will release this bond to *William Brook;* but, in point of fact, she did what was much more, for she left him a property of considerably greater value than the £500. These circumstances induce me to believe that Mr. *Badley* was acquainted with the contents of the will of the testatrix. It is scarcely credible, if I have arrived at a correct conclusion in believing that the testatrix intended to leave the residue for charitable purposes, and that she believed she had done so, that she should not have communicated that fact to Mr. *Badley*, the more so as Mr. *William Robinson* had told her that it was necessary that she should do so, and as she told Mr. *Cochrane* that the friend on whom she could rely for that purpose was Mr. *Badley*. The evidence is very strong to shew that Mr. *Badley* not only did not deny that the property was given to him and his son in trust for charitable purposes, but stated that he intended and was desirous so to apply it. The evidence of what took place at the funeral is very strong on this subject, as far as *James Badley* is concerned. [His Lordship then read the passages from the affidavits of *Brook* and *Thomas Henry Pargeter*, before stated.]

The conversation mentioned by *Pargeter* imports a knowledge of

more than the general character of the will, and gives point to what is said about the silence of *James Badley* when *Brooke Robinson* said that the residue was given for charitable purposes.

There are eight witnesses, who all concur in stating that *Brooke Robinson* stated, on reading the will, that the residuary estate was left to Mr. *Badley* and his son for charitable purposes, and it is not unworthy of notice that Mr. *Badley* himself was not present at the reading of the will. He unquestionably was her most intimate friend. He had, however, shortly after her death taken the will to the office of *Brooke Robinson*, by whom it was opened, and the contents mentioned to Mr. *Badley*, who, indeed, as I have said, was, in my opinion on the evidence, already acquainted with them. It would be remarkable, if the statement made by Mr. *Brooke Robinson* were wholly devoid of foundation, that Mr. *Badley*, who must have heard of it from his son, should not have taken the earliest opportunity of disputing the accuracy of that statement.

The evidence on the part of the Defendants is necessarily slight. It is not for them to prove the negative; the burthen of proof lies upon the Plaintiffs. It remains to examine the answer, for the purpose of seeing in what manner they resist the case of the Plaintiffs. [His Lordship then read paragraphs 15 and 30 of the answer.]

Upon the whole, regarding these passages in the answer to be construed most strictly against the persons who make them, I have arrived, after some hesitation, at the conclusion that Mr. *Badley*, during the life of the testatrix, was aware of the residuary disposition contained in her will, and that it was intended by her to be applied for charitable purposes, and that, although he never made any express promise so to dispose of it, he gave her to understand, either by silence or acquiescence, that he would do so, if she intrusted him and his son with the management of it; and I think, also, that even more than this is shewn, and that he now intends so to dispose of it, if the Court should be of opinion that this case is not sufficiently made out to establish a trust of the property against him and his son, and that, in the whole course he is now taking in this matter, he is not acting for the individual personal benefit and advantage of himself and his son as beneficial legatees under the will, but that he is doing all that lies in his power faith-

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fully and piously to comply with the wishes of his departed friend and benefactress.

Such being my opinion, I am compelled to declare that he and his son are trustees of the residue for the heiresses-at-law and the next of kin, according to the respective characters of the property, and that they must account for it as such; but, in so accounting, any sums which they have paid for charitable purposes, should, in my opinion, be charged and allowed to them in taking these accounts, and, as far as possible, be paid out of that portion of the pure personalty which is given for charitable purposes. I am also of opinion that the costs of all parties, as between solicitor and client, should be paid out of the residue so declared to be in trust for the heiresses-at-law and next of kin. As to the Defendants, they are trustees, and I think they have done no more than their duty in endeavouring to carry into effect the wishes and intentions of the testatrix. As to the other persons, in fact, the fund belongs to them. I will, therefore, make a decree accordingly.

Solicitors for the Plaintiffs: Messrs. *Clarke, Woodcock, & Ryland*, agents for Mr. *Chesshire, Birmingham.*

Solicitors for the Devisees: Messrs. *Ashurst, Morris, & Co.*

Solicitor for the other Defendants: Mr. *S. W. Johnson.*

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FREELAND *v.* PEARSON.

Will—Power to appoint to Children at decease of Donee—Power, whether exercisable by Deed.

A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such a distribution and disposal of his then remaining property among his children as might seem just and equitable, according to her discretion":—

Held, a power to the wife, exercisable by will only, to appoint in favour of the testator's children living at her death.

BENJAMIN LINSEY, by his will, dated the 7th of January, 1841, after appointing his wife, *Elizabeth L. Linsey*, executrix, and giving her for her sole use during her life all his property, both

personal and real, proceeded as follows:—"I also direct her, my dear wife aforesaid, to pay my funeral expenses, and all my just debts, and at her decease to make such a distribution and disposal of all my then remaining property among my children as may seem just and equitable, according to her best discretion and consideration."

Benjamin Linsey died on the 9th of January, 1841, leaving his widow, who proved the will, and eight children.

In January, 1848, *E. L. Linsey*, by deed, appointed part of the testator's real estate to *B. A. Linsey*, one of his children, in fee, subject to her life estate, and at the same time she released to him her life estate in the same property. She afterwards appointed, by deed, other part of the testator's real estate to *T. B. Linsey*, another of his children, and he, in 1859, placed the title deeds of the property so appointed to him in the hands of his solicitor, *Scott*, who claimed a lien upon them for costs.

By her will, dated the 8th of August, 1861, *E. L. Linsey*, after reciting her husband's will, gave all the property "of which she had power to make distribution and disposal by the said will" to trustees in trust for the children *nominatim* (other than the Plaintiff *Elizabeth Freeland*, to whom she gave £5), in equal shares; and after stating that, "at the solicitation of some of her sons, she had made certain deeds of gift contrary to her late husband's will, and not legally passing the estate so given," she "requested the same to be delivered up to her trustees to be cancelled, to prevent any dispute," and she appointed her daughter, *Martha Pearson*, and two other persons, executrix and executors.

B. A. Linsey died in September, 1865, leaving issue, who survived *E. L. Linsey*, and having devised and bequeathed all his real and personal estate to his wife, *Eliza D. Linsey*.

E. L. Linsey died in October, 1865, and her will was proved by *Martha Pearson*. In February, 1866, this suit was instituted by *Elizabeth Freeland* and her husband, against the other surviving children of *B. Linsey*, *Eliza D. Linsey*, and *Scott*, to ascertain the rights of the parties interested under the two wills, and for the execution of the trusts of the wills.

This was the hearing on motion for decree.

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Mr. *Southgate*, Q.C., and Mr. *Ellis*, for the Plaintiff; and Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the surviving children of *B. Linsey*:—

Under the will of *B. Linsey*, the widow had a power to appoint by will only to the testator's children who survived her: *Kennedy* v. *Kingston* (1); *Reid* v. *Reid* (2). It is true that in *In re Mortlock's Trust* (3) Vice-Chancellor *Wood* held that the words "to be disposed of as he pleases at his death," created a power to dispose of the property by will or otherwise; and in *In re Davids' Trusts* (4) he followed his former decision; but the point does not appear to have been argued in either of those cases, and the contrary decisions above referred to were not cited. In this will the words "then remaining property" are an additional ground for construing the power as testamentary only. Therefore the two appointments by deed were invalid, and as the 33rd section of the *Wills Act* does not apply to appointments under special powers: *Griffiths* v. *Gale* (5); *Eccles* v. *Cheyne* (6); the share appointed by the will of *E. L. Linsey* to *B. A. Linsey* must go to the surviving children of *B. Linsey*, as unappointed.

Mr. *Marten*, for *Eliza D. Linsey*:—

The power was exercisable by deed or will, and all the children of *B. Linsey*, whether or not they survived their mother, were objects of the power. In *Tomlinson* v. *Dighton* (7), the devise was to the testator's wife for life, and "then to be at her disposal, provided it be to any of his children, if living;" and it was held that a conveyance from the wife, by lease and release, to the testator's daughter in tail, with remainder to his son in fee, was a good execution of the power. In *Ex parte Williams* (8), a gift to the testator's wife for life, "to be by her divided, according to the best of her judgment, among such of his children and their issue as should be surviving at the time of her decease," was held to create a power to be executed by deed or will. *In re Mortlock's Trust* and *In re Davids' Trusts* are clear authorities to the same effect.

(1) 2 Jac. & W. 431.
(2) 25 Beav. 469.
(3) 3 K. & J. 456.
(4) Joh. 495.
(5) 12 Sim. 327, 354.
(6) 2 K. & J. 676.
(7) 1 P. Wms. 149.
(8) 1 Jac. & W. 89.

In *Kennedy* v. *Kingston* (1) the words were, "at her decease to be divided in portions," and the case was probably decided by analogy to the rule, that, where the only gift consists in a direction to divide the fund at a future time, the vesting is postponed until that time: here the word "disposal" is more general, and admits of a less restricted construction. In *Reid* v. *Reid* (2) the words "at her death" occurred in the middle of the gift over; here they are in the appropriate place for a gift in remainder after a life interest, and do not point to the time when the power is to be exercised, or cut down the words "my children," so as to mean "my children then living." Therefore the appointment by deed to *B. A. Linsey* was valid, and *Eliza D. Linsey*, as his devisee, is entitled to retain the property so appointed to him.

Mr. *Bush*, for *Scott*:—

T. B. Linsey, having survived his mother, was an object of the power, and there is no case which decides that the power could not have been exercised by deed. In *Kennedy* v. *Kingston* that question was not raised; and in *Reid* v. *Reid*, the only appointment having been made by will, it was unnecessary to decide the question, and the observation that the power was testamentary was only a *dictum*.

Mr. *Southgate*, in reply:—

The words "at her decease" were absent in *Tomlinson* v. *Dighton* (3) and in *Ex parte Williams* (4).

Feb. 12. LORD ROMILLY, M.R.:—

The question which arises in this case is on the construction of a will, whether the donee of the power contained in it could exercise the power by any means otherwise than by will amongst the children who survived her. [His Lordship then stated the facts, and continued.] This question is really simply a conflict of authorities. In the case of *Kennedy* v. *Kingston*, I think

(1) 2 Jac. & W. 431.
(2) 25 Beav. 469.
(3) 1 P. Wms. 149.
(4) 1 Jac. & W. 89.

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this very same question arose; it is as close to this case as it can well be. The same question also arose in *Reid* v. *Reid* (1), in which I seem to have followed the rule that was laid down in *Kennedy* v. *Kingston* (2); and these two cases are, in my opinion, not distinguishable from the present. But then I am referred to two other cases—viz., *In re Mortlock's Trust* (3), and *In re Davids' Trusts* (4), in which the opposite seems to have been decided. However, on looking at those cases as carefully as I can, the point does not seem to me to have been raised by counsel in either of them; it does not seem to have been argued, and the two earlier cases to which I have referred do not seem to have been cited. I think, if it depended on this alone, I must follow the cases in which this point has been expressly determined after argument, and not the cases in which, possibly because, as it sometimes unfortunately happens, both sides may have wished the Court to decide in a particular way, the authorities were not fully brought before the attention of the Court. Two other cases were cited by Mr. *Marten*, on which he placed considerable reliance. One was *Tomlinson* v. *Dighton* (5); but I think that the question did not arise there. Mr. *Marten* cited it for the purpose of shewing that this was a power which could be exercised by deed; but the words in that case are very different from the words here, which are: "at her decease, to make a distribution and disposal of them;" whereas in *Tomlinson* v. *Dighton* it is to the wife for life, and "then to be at her disposal, provided it be to any of her children, if living, if not, to any of his kindred that his wife shall please." Therefore, though the objects of the power are specified, if there are any children, to be those children, it is expressly directed that it shall be at her disposal at any time, and not merely to be at her disposal at her decease. The other case was the case of *Ex parte Williams* (6). There the testator gave all his real and personal estate to his wife for her life, "to be by her divided, according to the best of her judgment and discretion, among such of his children and their issue as should be surviving at the time of her decease." There is nothing at all there specifying that it is to be

(1) 25 Beav. 469.
(2) 2 Jac. & W. 431.
(3) 3 K. & J. 456.
(4) Joh. 495.
(5) 1 P. Wms. 149.
(6) 1 Jac. & W. 89.

done simply at her death, and therefore I think that both those cases are distinguishable from the cases of *Kennedy* v. *Kingston* (1), and *Reid* v. *Reid* (2), in which the point was expressly determined. In *Kennedy* v. *Kingston* the words are, "To *Ann Rawlins* for her life, and at her decease to divide it in portions as she shall choose to her children," and it was held that the children who were living at her death were the only objects of the power, and were, as such, entitled to a share lapsed by the death of a child to whom it had been appointed. The same thing was decided in *Reid* v. *Reid*. I am of opinion that I must follow those two cases, and therefore make a declaration that Mrs. *Linsey* could only exercise the power by will in favour of the children who survived her, and that the share appointed by her will to *Benjamin Augustus Linsey* goes, in default of appointment, to the surviving children. As to this share, the question was raised, whether the 33rd section of the *Wills Act* applied, but I think that is quite settled by the case of *Griffiths* v. *Gale* (3), and that though that section would apply to any property which Mrs. *Linsey* had of her own which she had power to dispose of, it does not apply to that which she took for life under her husband's will, with a power of appointment among his children.

Solicitors for the Plaintiffs: Messrs. *Mathews, Carter, & Bell.*

Solicitors for the Defendants: Messrs. *Wrentmore & Sons;* Mr. *C. W. Davis,* jun.

(1) 2 Jac. & W. 431. (2) 25 Beav. 469.
(3) 12 Sim. 327, 354.

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Feb. 9, 11.

BRIDGE *v.* BEADON.

Assignment of Equitable Interest—Trustee—Original and Derivative Trusts—Notice to whom to be given—Priority—Mortgage.

3 Ch D 498

The priority of assignments of the equitable interest in personal estate settled upon such trusts as *A.* shall appoint, and appointed by *A.* to trustees in trust for the assignor, depends upon priority of notice to the trustees of the original settlement, so long as the trust estate is under their control; consequently, a mortgagee of such interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees of the original settlement, was postponed to a subsequent mortgagee without notice of the prior mortgage, who gave notice to both sets of trustees.

By the settlement made in 1807, upon the marriage of *William Rowcliffe* and *Elizabeth Shattock* personal estate was vested in trustees, upon trust, after the marriage, for the separate use of Mrs. *Rowcliffe* for life, and after her death, in the event (which happened) of there being no children of the marriage, upon trust for such person or persons as she should, notwithstanding her coverture, by deed or will appoint.

Mrs. *Rowcliffe*, by deed, appointed £150 a year to her husband for his life out of the income of the trust property, and by her will, dated the 7th of November, 1822, she appointed (among other legacies) £600 to her nephew *F. G. Shattock*, and £1500 to her nephew *J. S. Shattock*, and she appointed *S. F. Bridge* and *J. Yates* trustees for her nephews as to the legacies thereinbefore given to them respectively, and authorized them to receive and give receipts for such legacies, and to invest the same in their names, and to apply the interest for and towards the maintenance and education of her said nephews; and she appointed *Bridge* and *Yates* executors.

Mrs. *Rowcliffe* died in 1823, and *Bridge* took out limited administration with her will annexed. At the time of her death *F. G. Shattock* and *J. S. Shattock* were infants. *J. S. Shattock* died an infant in 1825 in the lifetime of his father, *John Shattock*, who died in 1826, having bequeathed all his property to his widow, *Elizabeth A. Shattock*. In 1828 *Elizabeth A. Shattock* married *R. Richards*, and by the settlement made on their marriage the

£1500, which had been appointed to *J. S. Shattock*, was settled upon trust (after the deaths of *W. Rowcliffe* and Mrs. *Richards*) for the children of Mrs. *Richards*, in such shares as she should by deed or will appoint. In 1830 Mrs. *Richards*, by deed, appointed £400 out of the £1500 to *F. G. Shattock*.

In December, 1830, *F. G. Shattock* mortgaged the £600 appointed to him by Mrs. *Rowcliffe's* will, and the £400 appointed to him by Mrs. *Richards*, to *E. L. Sanders*, *C. R. Sanders*, and *J. B. Sanders*, to secure £185, and the deed of appointment of the £400 was handed over to them.

In 1824 the suit of *Bridge* v. *Beadon* was instituted for the execution of the trusts of Mrs. *Rowcliffe's* will, and of the settlement of 1807, and at the date of the mortgage to Messrs. *Sanders*, the property subject to the trusts of that settlement consisted of £420 consols, in Court in the suit, and various sums of money secured by mortgages and bonds, which were vested in and under the control of *R. Beadon*, the surviving trustee of the settlement of 1807.

Messrs. *Sanders* gave notice of their mortgage to *Bridge* and *Yates*, and to the trustees of Mrs. *Richards'* settlement, but not to *Beadon*.

In 1834 and 1835 the rest of the trust property subject to the settlement of 1807 was got in and paid into Court by *Beadon*. The whole of the income was required to pay *W. Rowcliffe's* annuity.

In 1839 *F. G. Shattock* mortgaged the £600 and £400 to *S. C. Whitbread* and *R. Martineau*, who had no notice of the prior mortgage to Messrs. *Sanders*, to secure £900 and further advances; notice of this mortgage was given to *Beadon* and to *Bridge*, each of whom, before the execution of the mortgage, told the mortgagees that he had no notice of any incumbrance on the mortgaged property.

In 1852 *Whitbread* and *Martineau* obtained a stop order on so much of the fund in Court as *F. G. Shattock* was entitled to.

Mrs. *Richards* died in 1855, *W. Rowcliffe* died in 1864, and *R. Martineau* died in 1865.

In pursuance of an order made, in July, 1866, in *Bridge* v. *Beadon*, and three other suits relating to the same trusts, £620 consols, being so much of the fund in Court representing the trust

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property under the settlement of 1807, as was attributable to the above-mentioned sums of £600 and £400, was carried over to the separate account of *F. G. Shattock* and *S. C. Whitbread*, his mortgagee.

In November, 1866, the executors of the survivor of the Messrs. *Sanders*, who had not been made parties to the suits, obtained a stop order on the £620 consols, and they now presented a Petition to have their mortgage debt paid out of that fund.

Whitbread's mortgage debt considerably exceeded the amount of the fund in Court.

Mr. *Baggallay*, Q.C., and Mr. *Ford*, for the Petitioners:—

The mortgage of 1830 takes priority over the subsequent mortgage. The mortgagees did all that was necessary to perfect their security, by giving notice to the trustees appointed by Mrs. *Rowcliffe's* will. They were not bound to give notice to the trustee of the settlement of 1807, who had nothing to do but to hand over the fund, when payable, to the trustees of the will. The mis-statement made by *Bridge* to the second mortgagees cannot affect the priority of the first mortgage, and the remedy, if any, of the subsequent mortgagees must be against him personally. The non-production by the mortgagor to the second mortgagees of the deed by which the £400 was appointed to him, ought to have put them upon further inquiry.

Mr. *Southgate*, Q.C., and Mr. *Martineau*, for *Whitbread*:—

The priority of the mortgages depends upon priority of notice to the trustee of the settlement. At the date of the mortgage to the Messrs. *Sanders*, the fund was under his control, and notice to him was essential to the perfecting of their security.

F. G. Shattock, in person.

Mr. *Baggallay*, in reply.

Feb. 11. LORD ROMILLY, M.R.:—

The question in this case is, whether the mortgage to Messrs. *Whitbread* and *Martineau*, made in 1839, has priority over the

mortgage to Messrs. *Sanders*, made in 1830, by reason of priority of notice.

As regards so much of the sum of £420 consols, which was in Court at the date of the earlier mortgage, as was applicable towards the payment of the two sums of £600 and £400, it is clear that the subsequent mortgagees obtained priority by the stop order obtained by them in 1852. The principal question, however, is, whether *Beadon*, the trustee of the original settlement, was the person to whom notice of the mortgages ought to have been given. By the will of Mrs. *Rowcliffe* the legacies of £600 and £1500 were appointed to her nephews, and *Bridge* and *Yates* were appointed trustees of the legacies, to receive them and apply the interest for the maintenance and education of the legatees. I am of opinion that the trusts reposed in *Bridge* and *Yates* were intended to be confined to the period of the infancy of the respective legatees, and that each legatee, upon attaining twenty-one, would be entitled to receive his legacy directly from the trustees of the settlement. But even if the testatrix had appointed the legacies to the trustees in trust for her nephews, I am of opinion that so long as the trusts of the settlement had not been fully executed, and the trust funds remained under the control of the trustee of the settlement, that trustee was the person to whom an assignee of the legacies was bound to give notice. If, at the death of *William Rowcliffe*, these legacies had been paid over to the trustees under the will, notice to the trustee of the settlement would from that time have ceased to be necessary, but until the funds left his hands he continued to be the trustee for the purposes of notice. I must, therefore, hold that Messrs. *Whitbread* and *Martineau*, who gave notice of their mortgage to *Beadon*, obtained priority over Messrs. *Sanders*, who omitted to give such notice, and dismiss the Petition, with costs.

Solicitor for the Petitioners: Mr. *Philbrick*.

Solicitors for the Respondent *Whitbread*: Messrs. *Martineau & Reid*.

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Jan. 29, 30, 31; *Feb.* 12.

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Insurance Company—Winding-up—Policy Holders—Shareholder-Creditors—Limit of Liability—Marshalling.

By the deed of settlement of an insurance company, and by the terms of the policies issued by the company, it was provided that the capital stock and funds of the company should alone be liable to claims in respect of the policies, and that no shareholder should be liable to such claims beyond the amount of the unpaid part of his share in the capital of the company. The company was wound up, and calls to the full amount of the unpaid capital were made, and the proceeds of such calls, together with the other assets of the company, were applied in paying part of the costs of the winding-up, and in paying dividends on the debts due to policy holders and general creditors of the company, *pari passu* :—

Held, that the doctrine of marshalling did not apply, and that no further call could be made upon the shareholders for the purpose of recouping to the policy holders the amount of the capital which had been paid to the general creditors, but that the costs of the winding-up must be borne by the shareholders, and not be paid out of the capital of the company, and consequently a further call must be made, not only to pay the balance of the debts of the general creditors, but also to replace the capital which had been applied in payment of costs.

The deed of settlement of a company, formed under 7 & 8 Vict. c. 110, provided that every shareholder, as between himself and all or any of the other shareholders, should be liable for the debts of the company in proportion to his share and interest for the time being in the funds or property of the company, but not further or otherwise, and that the directors should pay any debt due from the company to a shareholder in the same manner as if such shareholder were an ordinary creditor of the company. The company was wound up, and calls were made to the full amount of the unpaid capital, but the proceeds were insufficient to pay the debts of the company :—

Held, that creditors, who were also shareholders, were entitled to have their debts paid in full (less the amount of the calls to be made for that purpose on their own shares) by means of a further call on the shareholders, and that if any of the shareholders were unable to pay the call, the deficiency must be made up by the other shareholders.

THIS was a summons, adjourned from Chambers, taken out by the official manager of the *Professional Life Assurance Company*, now being wound up, for leave to make a call of £4 per share on the contributories. The company was registered in March, 1847, under the 7 & 8 Vict. c. 110, with a nominal capital of £250,000, divided into 20,000 shares of £12 10*s.* each, which were subse-

quently changed, under the provisions of the deed of settlement, into 40,000 shares of £6 5*s.* each.

In accordance with a provision contained in the deed of settlement (1), all the policies issued by the company contained the

(1) The clauses of the deed of settlement principally referred to in the arguments were as follows:

93. "That the board of directors shall cause to be inserted in every policy issued by the company, and in every instrument by which an annuity may be secured by the company, or to be endorsed thereon respectively, a declaration that the capital stock and funds of the company shall alone be liable to answer and to make good all claims in respect of any such policy or annuity, and that no director or proprietor of the company shall in any manner be personally liable or subject to any such claims or demands, or be in anywise charged by reason of such policy or annuity beyond the amount of his or her share or shares of such capital, stock, or funds.

152. "That if at any time or times hereafter any sum or sums of money shall be wanted for the purposes of the company, it shall be lawful for the board of directors, if they shall think it expedient so to do, instead of raising the same by calling for any further instalment, to borrow and take up the same at interest, either from the proprietors, in which case each proprietor shall be entitled to contribute in proportion to the number of his shares in the capital of the company, or from any person or persons who may be willing to lend or advance the same, and to give security for the payment thereof by mortgage of freehold, or leasehold, or other property of the company, or by means of any other security: Provided always, that in case the board of directors shall think it expedient to borrow any such sum or sums in the name or on behalf of the company in any other manner than from the proprietors thereof, they shall at the next general meeting, if the same shall be held within four calendar months next thereafter, report to such meeting the sum or sums which shall be so borrowed, and the nature of the security which shall have been given for the same: Provided further, that the sum or sums of money which may be borrowed and taken up at interest by the board of directors in the name, or on behalf, or for the purposes of the company, under the authority of this provision in any other manner than from the proprietors of the company, shall not, including any money which may have been previously borrowed and which may be then unpaid, at any one time exceed in the whole the sum of £50,000.

256. "That every proprietor of the company, his or her executors, administrators, or assigns, as between him, her, and them, and all or any of the other proprietors of the company, and their respective heirs, executors, administrators, and assigns, shall be answerable and liable for and in respect of the calls, debts, losses, and demands of or upon the company in proportion to his or her share and interest for the time being in the funds or property of the company, but not further or otherwise.

260. "That if the company, or any person acting for or on behalf of the company, shall be indebted to any proprietor of the company, or his or her executors or administrators, for any matter or thing relating to the company, the board of directors shall upon application to them pay the debt due or owing to such proprietor, or his or

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following proviso: "Provided also, that the capital stock of £250,000 sterling, and other the stocks, funds, securities, and property of the said company remaining at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement,

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her executors or administrators, without reference to the general accounts of the company, and without requiring any other accounts to be taken than that under which the debt applied for shall have arisen, and so and in such manner as if such proprietor were an ordinary creditor of the company without being interested as a partner therein."

The 263rd clause provided that any money or debt due by the company recovered by action or suit against a proprietor of the company, and all loss, damages, and expenses, sustained by such proprietor, should be considered as a debt due by the company to such proprietor, and should be borne and paid by the proprietors for the time being in proportion to their shares or interest in the capital of the company.

265. "That if the directors or trustees for the time being of the company shall neglect or refuse, or shall not have in their hands sufficient funds belonging to the company to enable them to pay, within the space of fourteen days next after such demand as aforesaid shall have been made upon them, the whole or any part of such debt and costs, then and in such case such debt and costs, or so much thereof as shall not have been paid by the directors or trustees, shall be divided by the proprietor or proprietors, or other person or persons by whom the same shall have been decreed or adjudged to be paid, or who shall be subject or liable to pay the same, into 20,000 equal shares, or into as many equal parts or shares as the capital of the said company shall be considered as at that time divided into, and each and every proprietor for the time being of the said company shall, in proportion to the extent of his or her share and interest therein, pay one or more of such equal parts or shares, upon demand, to the proprietor or proprietors, or other person or persons who shall have paid or who shall be liable to pay such debt and costs.

266. "That if execution should be issued against any proprietor upon a judgment obtained against the nominal plaintiff or defendant, or plaintiffs or defendants, in an action brought against the company, and the proprietor against whom such execution be issued shall not, within the space of fourteen days, be reimbursed out of the funds and property of the company, all such moneys, costs, and charges as he shall have paid, or be put unto, or become chargeable with, in consequence of such execution having been issued against him, it shall be lawful for such proprietor to divide such moneys, costs, and charges, or so much thereof as he shall not within the time aforesaid have been so reimbursed as aforesaid, into as many equal parts or shares as the capital shall at that time be considered as divided into, and all and every proprietor for the time being of the said company shall, in proportion to the extent of his share or interest therein, pay one or more of such parts or shares upon demand, to the proprietor against whom such execution shall have been issued, or to his or her executors or administrators."

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shall alone be liable to answer and make good all claims and demands upon the said company, and that no director or other proprietor of the said company, his heirs, executors, or administrators, shall, by reason of any policy of assurance, or of the whole of the policies of assurance taken together, which any director has signed or may sign, be in anywise individually liable or subject to any such claims or demands beyond the amount of the unpaid part of his share or shares in the said capital stock of £250,000.

The company was ordered to be wound up in May, 1861, and shareholders representing 38,884 shares, had been settled on the list of contributories.

Calls had been made upon the contributories under the winding-up, to the whole amount of their subscribed capital remaining unpaid at the date of the winding-up, and the total amount produced by such calls was £70,148. The other assets of the company at the date of the winding-up produced £8,244.

At the date of the winding-up there was due to the policy holders, £65,682, and to the general creditors of the company £55,582. The official manager had applied the whole of the proceeds of the calls, and the assets of the company, in payment of part of the costs of the winding-up, and in payment of dividends to the policy holders and general creditors of the company *pari passu;* but there remained due to the policy holders £30,677, and to the general creditors £28,800, of which about £400 was due to creditors not being shareholders, and the rest to shareholders, from whom the directors had borrowed money under the 152nd clause of the deed of settlement. Under these circumstances, the official manager proposed to make a further call of £4 per share, for the purpose of paying the remainder of the debts due to the policy holders and creditors, and the rest of the costs of the winding-up. Several of the contributories objected to any call being made, except for the purpose of costs, on the ground that the terms of the policies relieved them from all liability to the claims of the policy holders, beyond the amount of their subscribed capital, and that the deed of settlement imposed a similar limit to their liability to the claims of creditors, or, at all events, of those creditors who were also shareholders.

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Many of the contributories were insolvent.

As the shareholder-creditors were represented by counsel, and the amount due to the outside creditors was comparatively small, it was arranged that the counsel for the creditors' representative should argue the case on behalf of the policy holders.

Mr. *Selwyn*, Q.C. (Mr. *Roxburgh*, Q.C., with him), for the official manager, took no part in the argument.

Mr. *Southgate*, Q.C., and Mr. *Pember*, for the creditors' representative:—

The capital stock and funds of the company at the date of the winding-up, including the money subsequently raised by calls, were more than sufficient to answer the claims of the policy holders, but have become insufficient, by reason of the payment of the debts of the general creditors, and the costs of the winding-up. After the decision in *In re State Fire Insurance Company* (1), it must be admitted that the policy holders have no charge upon the capital of the company, entitling them to priority over the creditors; but inasmuch as the creditors have not only the right to be paid *pari passu* with the policy holders out of the capital of the company, but also the right to call upon the shareholders personally to pay the full amount of their debts, and they have resorted to the capital, which was the only fund available for the claims of the policy holders, the doctrine of marshalling applies, and the policy holders are entitled to stand in the place of the creditors, and to have a call made upon the shareholders, for the purpose of recouping the amount by which the capital has been diminished by the payments made to the creditors. It is true that in *In re State Fire Insurance Company* (2), Vice-Chancellor *Wood* decided against the claim of the policy holders; but, upon appeal, the Lords Justices reserved the question of marshalling, and the Vice-Chancellor subsequently modified his previous decision so far as to throw the whole costs of the winding-up upon the shareholders, beyond their subscribed capital. But it is submitted that his original decision cannot be supported. The arguments in that case in sup-

(1) 1 H. & M. 457; 1 D. J. & S. 634. 10 Jur (N.S.) 1016. n.

(2) 34 L. J. (Ch.) 436. 10 Jur (N.S.) 1015.

port of the policy holders appear to have proceeded rather upon the ground that the policies created a charge on the capital, than upon the doctrine of marshalling, and the judgment was founded upon the terms of the contract contained in the policies. But marshalling does not depend upon contract; it is a general right, founded upon the principle of equity, that he who has two funds to satisfy his demand, shall not, by his election, disappoint him who has only one fund: *Lanoy* v. *Duke of Athol* (1); *Aldrich* v. *Cooper* (2); *Gibson* v. *Seagrim* (3); *Ex parte Stephenson* (4). That right must exist here, unless it has been excluded by express contract; but no such contract can be found, either in the policies or in the deed of settlement. In *In re Prince of Wales Life Assurance Society* (5), and in *In re English and Irish Church and University Assurance Society* (6), Vice-Chancellor *Wood* expressed opinions in favour of the application of marshalling in such a case as this. In his judgment in *In re State Fire Insurance Company* (7), he speaks of charges being "marshalled" in order of date, and it is probable that when he said, in the subsequent judgment in *In re State Fire Insurance Company* (8), that marshalling has no application to cases of this description, he was using the word in the same sense, and referring to the alleged priority of the policy holders. It is settled that a policy making the capital of the company alone answerable to the claims of the policy holder entitles the policy holder to enforce his claim in equity: *Hutchinson* v. *Wright* (9); *Robson* v. *M'Creight* (10); *In re Athenæum Life Assurance Society* (11); *Law* v. *London Indisputable Life Policy Company* (12).

The costs of the winding-up are costs of management, and must be paid by the shareholders, and not out of the fund available to the policy holders, and, at all events, the amount of the costs already paid must be recouped by means of a call, as in the case of *In re State Fire Insurance Company*.

(1) 2 Atk. 444.
(2) 8 Ves. 382; 2 Wh. & T. L. C. 3rd Ed. 66.
(3) 20 Beav. 614.
(4) De G. 586.
(5) Joh. 80.
(6) 1 H. & M. 79, 85.
(7) Ibid. 457, 465.
(8) 34 L. J. (Ch.) 436;
(9) 25 Beav. 444;
(10) Ibid. 272;
(11) 4 K. & J. 549;
(12) 1 K. & J. 223;

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Sir *Roundell Palmer*, Q.C. (Mr. *Fry* with him), for the shareholder-creditors:—

The liability of the shareholders of a joint stock company registered under the 7 & 8 Vict. c. 110 to pay the debts of the company properly incurred, cannot, as regards outside creditors, be limited by the deed of settlement: *Greenwood's Case* (1). In the absence of any provision to the contrary in the deed of settlement, a creditor, who is also a shareholder, has the same rights as an outside creditor, except that he must contribute his due proportion of the debt due to himself as well as of the other debts of the company. The debts of the shareholder-creditors in this case have been properly incurred in pursuance of the 152nd clause of the deed, and the deed, so far from limiting the liability of the shareholders in the case of debts due from the company to individual shareholders, appears to have been framed with a view of negativing any possible distinction between shareholder-creditors and outside creditors. The 256th clause only provides that each shareholder, as between himself and the others, shall only bear his proportionate share of the debts, losses, and demands, of or upon the company; but does not affect the question between him and the creditor; the 260th clause expressly places the shareholder-creditor on the same footing as an ordinary creditor; the 263rd clause makes a shareholder who has been compelled to pay a debt of the company, a creditor of the company and of the shareholders, in proportion to their shares, in respect of such debt; and the 265th, and 266th clauses work out the details of the principle of contribution among the shareholders, but do not cut down the right of the shareholder-creditor.

That right has been established by the case of *In re Norwich Yarn Company* (2), where the deed of settlement contained a clause in almost the same words as the 256th clause of the deed in this case.

Mr. *Baggallay*, Q.C., Mr. *Collins*, and Mr. *W. W. Mackeson*, for contributories:—

All persons dealing with a joint stock company are bound to

(1) 3 D. M. & G. 459; 18 Jur. 367 (2) 22 Beav. 143; 2 Jur. N.S. 96

look to the terms of the deeds of settlement: *Ernest* v. *Nicholls* (1), *Balfour* v. *Ernest* (2); if, therefore, the deed of settlement limits the liability of the shareholders to the subscribed amount of their shares the policy holders and shareholder-creditors, and even the outside creditors, are not entitled to any further call upon the contributories.

As to the policy holders and annuitants, it is admitted that they are prevented by the terms of their policies, as well as of the deed of settlement, from making any direct claim against the shareholders beyond their subscribed capital, and that they can only make such claim indirectly upon the principle of marshalling. But that principle does not apply to this case; even if the liability of the shareholders to pay the debts of the general creditors be unlimited, the creditors have not two funds to either of which they may resort; they cannot proceed against the individual shareholders until they have exhausted the capital and assets of the company, and the liability of the shareholders to make good so much of their debts, as the capital and assets prove insufficient to satisfy, cannot be treated, for the purpose of marshalling, as a second fund available equally with the capital and assets for payment of such debts. The argument of the policy holders is in a circle: they ask for a call, on the principle of marshalling, for the purpose of creating that second fund, the existence of which is a condition precedent of the application of the doctrine of marshalling. Moreover, the right to marshalling is expressly excluded by the terms of the contract; they have contracted that the capital and property of the company remaining at the time of the claim unapplied and undisposed of, and inapplicable to prior claims in pursuance of the trusts, powers, and authorities, of the deed of settlement, shall alone be liable to answer their claims, and that no shareholder shall, by reason of any policy, be liable beyond the amount of the unpaid part of his shares. It may fairly be contended that these words, which are stronger than those of the policies in *In re State Fire Insurance Company* (3), preclude the policy holders from making any claim, even upon the capital of the company, until the general debts of the company have been paid; at all events they only entitle the policy holders to be paid

(1) 6 H. L. C. 401. (2) 5 C. B. (N. S.) 601.
(3) 1 H. & M. 457.

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pari passu with the creditors: *In re State Fire Insurance Company* (1); but it is now contended that, by reason of the policies, the shareholders can be made liable beyond the subscribed capital, because, in strict accordance with the terms of the contract, the creditors have been allowed to participate with the policy holders in the distribution of the assets of the company. It is clear that the policy holders have no such right at law: *Halket* v. *Merchant Traders Association* (2); *Hassell* v. *Merchant Traders Association* (3); *Hallett* v. *Dowdall* (4); and *In re State Fire Insurance Company* (5), is a distinct authority against any such claim under the winding-up in this Court. The Lords Justices in that case reserved the question of marshalling, which they thought did not arise, as the case stood before them, but the Vice-Chancellor afterwards, when it became necessary to decide the question, adhered to his former opinion.

As to the shareholder-creditors, it is clear that they are bound by whatever limit has been imposed by the deed of settlement upon their rights against their co-contributories. In this deed the 256th clause provides that no shareholder shall be liable for the calls, debts, losses, and demands of the company further or otherwise than in proportion to his share and interest for the time being, that is to say, the unpaid amount of his share in the subscribed capital. The terms of the 265th and 266th clauses still more clearly limit the liability of the shareholders to the amount of their subscribed capital, and it cannot have been intended that, while the right of a shareholder to contribution in respect of a debt of the company which he may have been compelled to pay was to be limited, his right in respect of money lent by him to the company with full knowledge of the provisions of the deed should be unlimited. The deed does not empower the directors to make calls beyond the amount of the subscribed capital in the event of the dissolution and insolvency of the company. The 152nd clause limits the power of borrowing from other persons, but not the power of borrowing from shareholders, because the limit of liability to the repayment of money borrowed from them, created by the 256th clause, was considered a sufficient safe-

(1) 1 H. & M. 457.
(2) 13 Q. B. 960.
(3) 4 Ex. 525.
(4) 18 Q. B. 2.
(5) 34 L. J. (Ch.) 436.

guard. If the 256th, 265th, and 266th clauses only provide that each shareholder is to contribute in proportion to the number of his shares, they are superfluous, and simply declare the law. In the case of *In re Norwich Yarn Company* (1), the original creditor, in whose place the directors stood, was not a shareholder; but if that case is not distinguishable from the present case, it is inconsistent with *In re Worcester Corn Exchange Company* (2), and *In re English and Irish Church and University Assurance Society* (3).

If, however, the deed is to be construed as merely fixing the amount of each shareholder's contribution by reference to the number of his shares, that amount must be ascertained by reference to the whole number of shares subscribed, and not to the number of shares held by solvent persons, and no call can be made upon the solvent shareholders to make good the deficiency produced by the insolvency of their co-shareholders.

[They also cited, as to the claim of the policy holders, *In re Athenæum Life Assurance Society* (4); *Evans* v. *Coventry* (5); *Averall* v. *Wade* (6); as to the contributory creditors, *Dering* v. *Earl of Winchelsea* (7); *Spottiswoode's Case* (8); *Ex parte Robinson's Executors* (9); *Yelland's Case* (10).]

Feb. 12. Lord Romilly, M.R.:—

This summons raises questions of great importance between the shareholders generally and three classes of creditors. These are: First, holders of policies under a special contract with the company; Secondly, shareholders who have lent money to the company, in respect of which they are creditors; Thirdly, the general creditors of the concern, who are in no respect mixed up with it further than this, that they are creditors of the company.

The company was incorporated on the 15th of March, 1847, and registered under the 7 & 8 Vict. c. 110. At that time the *Limited Liability Act* had not passed, and consequently, as regards general

(1) 22 Beav. 143, 2 Jur. N.S. 940
(2) 3 D. M. & G. 180.
(3) 1 H. & M. 79, 85.
(4) 3 De G. & J. 660, 5 Jur. N.S. 558
(5) 8 D. M. & G. 835, 843. 3 Jur. N.S. 1225.
(6) Ll. & Goo. 252.
(7) 1 Cox, 318.
(8) 6 D. M. & G. 345, 371.
(9) Ibid. 572.
(10) 5 De G. & Sm. 395.

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creditors, the shareholders of the company are liable to contribute to the full amount of their fortunes until the whole amount due to their creditors is paid. This is not disputed; the question is, whether this liability can be made use of as a means of compelling payment in full of debts to creditors not so situated. The company was a *bonâ fide* concern; it carried on business till 1861, when it failed, and was finally ordered to be wound up on the 11th of May, 1861. The shares originally were fixed at 20,000 of £12 10*s.* each; these were afterwards divided into 40,000 shares of £6 5*s.* per share. Nearly all were subscribed for, and contributories have been settled on the list for 38,884 shares of £6 5*s.* The contributories, or at least all of them that can, have paid up the calls made upon them, amounting in the whole to £6 5*s.* per share. A still further call is required to pay the amount due to the general creditors, but upon this a question arises as to the right of the holders of policies to be paid the amount of their policies due to them by means of so marshalling the assets, as that the assets of the company at the time of the winding-up and the first calls, may be applied in payment of the policy holders, leaving the general creditors to obtain the payment of the sums due to them by a general call on the shareholders of the company.

The deed of settlement of the company provided, as far as it could in the then state of the law, that the shareholders of the company should not be liable beyond the nominal amount of their shares. [His Lordship read the 93rd clause.] The claimants in respect of policies, after deducting what has already been paid to them, are creditors to the amount of £30,677 12*s.*; that is, in other words, the amount of the debts subject to the limitation provided for by this clause. The question raised by these claimants is thus put by them: "We do not," they say, "claim any priority on any funds of the company, but in this company there are two funds more or less applicable to the payment of debts; the first fund is the property of the company at the date of the winding-up, together with the balance of £6 5*s.* per share not then called up from the contributories. We, the policy holders, admit that we are bound by our contract not to look to anything beyond this fund, and if this fund be not sufficient to pay us, we must, to that extent, go unpaid; but the general creditors have a

second fund, to which they are entitled to have recourse, that is, the general liability of all the shareholders to pay their debts. Now, it is a settled principle of law that when there are two classes of creditors and two funds, and one class of creditors can only go against one fund, while the other class of creditors can go against both, the Court will marshal the assets, and restrict the creditors who have a double security from touching the fund applicable to payment of the first class of creditors, until they are paid in full." In affirmance of this proposition numerous authorities are cited, but it is not necessary to refer to them here, because the general proposition is not disputed; the contest here is, whether that principle has any application to this case. The contributories deny that there are two funds; they argue, that the contention of the policy holders, if successful, would be to create two funds, in order to raise the question, or, as it was pointedly put by Mr. *Mackeson* in his argument, it is admitted that there cannot be any marshalling of assets until the two funds exist, but you raise the question of marshalling, and claim a right to marshal in order to create a fund for that purpose which does not now exist.

I have considered this question as carefully as I can, apart from any decided case, and upon the assumption that the Lords Justices, in the case of *In re State Fire Insurance Company* (1), intended to avoid deciding this question, and to reserve for later consideration and decision, whether a case of marshalling arose in such a case as that before them, which was the same as that now before me, and having so considered it, I am of opinion that the case of the policy holders fails, and that they are bound by the 93rd clause, which I have read, not to obtain payment against the shareholders by means of, or out of, any money which shall be raised from them beyond the £6 5*s.* per share. The words are, "that no director or proprietor shall in any manner be personally liable or subject to any such claims . . . beyond the amount of his shares." It is, I think, a mere evasion of this contract, if the policy holder gets others to enforce payment and takes the payment through them. There is, I think, no ambiguity in this clause, and the terms of the policy itself also make it distinct, that the funds and capital stock shall alone be liable to pay the executors of the assured the

(1) 34 L. J. (Ch.) 436.

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amount due on the policy. The capital stock and funds of the company, which include the balance of unpaid shares, have been applied rateably in payment of all the claims on the company, including the policy holders and the general creditors. The general creditors are still unpaid in full, and they are entitled to make the contributories generally pay them, but, in my opinion, the capital stock and funds of the company are gone, and the policy holders cannot now claim anything in respect of their unliquidated demands. If the question of marshalling could have arisen at all, it must have arisen at the moment of what I may call the death of the company, on the 11th of May, 1861, but there were no funds to marshal at that time; the fund then existing was applicable indiscriminately to pay all, and those who contracted that they would receive payment out of that fund and no other, must go to that extent unpaid, unless, indeed, they are entitled to be paid out of the capital stock and funds of the company in priority to all other creditors. But this is a contention which cannot reasonably be insisted upon; it is, indeed, disclaimed by the counsel for the policy holders, and it is expressly negatived by the decision of the Vice-Chancellor *Wood* in *In re State Fire Insurance Company* (1), which was affirmed on appeal by the Lords Justices (2). In truth, it was well observed in the argument, that this case is exactly covered in all respects by the case of *In re State Fire Insurance Company* (3), before Sir *W. P. Wood*, and that whether it be called priority of charge, or marshalling, the question is exactly the same. In that case it was argued, and, I think, correctly, that the claim of the policy holders rested on priority of charge, and not on marshalling, but in consequence of that decision the question is argued before me as resting, not on priority of charge, but on marshalling. I agree, however, with the observation that fell from the Vice-Chancellor, that the doctrine of marshalling has no application to this case, and cases of this description, and I assent to, and adopt, his observation as to the construction of the contract in that case as applicable to this, and I say with him, that if I were to hold that the directors were bound to keep the capital stock and funds as liable solely for the particular purpose of paying the policy holders, I should hold that

(1) 1 H. & M. 457. (2) 1 D. J. & S. 634; 10 Jur. N.S. 1016

(3) 34 L. J. (Ch.) 436; 10 Jur. N.S. 1015

there would be a liability which the whole scope of the contract intended to avoid. I think that, so far as regards the capital stock and funds of the company alone, the policy holders should stand in exactly the same situation as the general creditors, no better and no worse, and that it must be applied in payment of their claims *pro ratâ*, exactly as if the company had been formed under the Act of 1862, and this had been the extent of the liability of the shareholders; this was the contract between the company and the policy holders, and they cannot go beyond it. By reason of the general law the general creditors can enforce payment against the shareholders generally, but the right is confined to them; the others have contracted not to make use of it.

The question as to the claims of the shareholders who have lent money to the company, is very different; they are not included in the 93rd clause which I have read, nor is there, indeed, any clause which expressly applies to them. If they, as well as the policy holders, were to be restricted to the capital stock and funds of the company, and put upon a different footing from other creditors, it ought to have been so specified in the deed. But this is not so, and the general scope and object of the deed, though aiming at limited liability, does not attempt to distinguish between any classes of creditors other than policy holders.

[His Lordship read the 152nd and 256th clauses of the deed.]

The other clauses of the deed are to the same effect; they require that the debts and losses shall be borne by the shareholders in proportion to their shares; but there is no provision that the shareholders who are also creditors, who have lent money to the company, or deposited money with it, shall only be entitled to come against the capital stock and funds of the company, and not seek repayment against the members of the company. On the contrary, the spirit of these clauses has, in my opinion, a contrary tendency, and provides only that the loss or payment shall be borne in proportion to the shares held by the contributories. The 256th clause does not appear to me to deprive the creditor, because he is a shareholder, of the right of receiving payment of his own debt; it only provides that he must, as one of the shareholders, bear his proportion of the contribution necessary for that purpose, in other words, that the call to be made for payment of

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the debt must be made on all alike, whether the contributory be or be not a creditor, and that the call must be made according to the number of the shares he holds. I consider that this question is, in truth, governed by my decision in the case of the *Norwich Yarn Company* (1), and although I should have no hesitation in departing from that judgment if, on reflection, I considered the decision erroneous, yet having fully considered it again, I have been unable to come to any other conclusion than that to which I came on that occasion. I think myself therefore bound to hold that the depositors, although shareholders and contributories, are entitled to be paid their debts in full, less so much as may be required from themselves to answer the call to be made for that purpose.

I shall in this case follow the course adopted by Sir *W. P. Wood* in the case of *In re State Fire Insurance Company* (2), in all respects, and direct the costs of all the parties to be paid out of the fund. The result will be, that somewhat less than £30,000 will have to be raised, and that a smaller sum than £4 per share will be the amount of the call, but this must be estimated by the official manager.

It is proper, however, that I should notice an argument of Mr. *Mackeson*, as to the amount of the call required. The available shares are, as I understand him to state, by insolvency, non-payment, or the like, reduced to such an extent, that his client's share has become one-sixth instead of what it originally was, one-sixteenth of the whole sum required to be raised. I think no question on this can arise; the call must be enforced on all the shareholders, as effectively as possible, but if some are really unable to pay, and the call cannot be enforced against them, the remaining shareholders who are solvent must make up the deficiency. This is one of the misfortunes that belong to all these cases.

Solicitors: Messrs. *Travers, Smith, & De Gex;* Mr. *Tayloe;* Messrs. *Vizard, Crowder, Anstie, & Young.*

(1) 22 Beav. 143, (2) 34 L. J. (Ch.) 436,

WARRICK *v.* QUEEN'S COLLEGE, OXFORD.

M. R.
1867
Feb. 12.

Practice—Production of Documents—Manor—Court Rolls—Custom.

In a suit, by a Plaintiff alleging himself to be a freehold tenant of a manor, against the lord, to establish customary rights over commons in the manor, where the Defendant, by answer, denied both the title of the Plaintiff and the alleged custom:—

Held, that the Plaintiff was entitled to production of all the Court rolls.

THE bill was filed by four Plaintiffs, on behalf of themselves and all other the tenants of the manor of *Plumstead*, against the lords of the manor, and it alleged that each of the Plaintiffs was the owner in fee of freehold hereditaments, holden freely of the lords of the manor; but it did not in any way specify what such hereditaments were. It further alleged that the Plaintiffs were entitled to certain rights of pasture, cutting turf, and digging sand and gravel, and other privileges, over certain commons in the manor, as rights appurtenant to their tenements holden of the manor; and that the lords of the manor had in divers ways interfered with the exercise of those rights. It prayed for a declaration that the Plaintiffs and other freehold tenants of the manor were entitled to the rights in question as appurtenant to their freehold hereditaments; for an injunction restraining the Defendants from interfering with their rights, and for other relief in respect thereof.

The Defendants, by their answer, denied that the Plaintiffs were freeholders of the manor, and also the existence of the rights in question.

The case now came on upon the Plaintiffs' summons to consider the sufficiency of the Defendants' affidavit as to documents, and certain objections thereby made to the production of documents in the Defendants' possession; and the question mainly discussed was, whether the Plaintiffs were entitled to examine the whole of the Court rolls of the manor, the Defendants insisting that they were entitled to seal up the whole of the rolls, except certain specified passages, which shewed that the Plaintiffs, or some of them, had served on the homage.

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Mr. *Joshua Williams*, Q.C., and Mr. *E. R. Turner*, for the Plaintiffs:—

Our object is to establish a custom in the manor. We are, therefore, entitled to see the whole of the Court rolls.

[They referred to *Rex* v. *Shelley* (1).]

Mr. *Selwyn*, Q.C., and Mr. *Lindley*, for the Defendants:—

We admit, on the authority of *Clegg* v. *Edmonson* (2), that the Plaintiffs are entitled to some discovery. The question is, to how much. It cannot be that on a mere fishing bill, the Plaintiffs simply alleging a title which is denied by the Defendants, the whole of the Court rolls are to be produced. Only so much ought to be produced as will enable the Plaintiffs to establish that they are freeholders of the manor: *Wigram* on Discovery (3). The case of *Rex* v. *Shelley* was a case of *mandamus* at common law, and there the tenant had established his title as a copyholder of the manor. Here the Plaintiff comes into a Court of equity, and can only obtain discovery according to the rules of the Court. A person claiming to be the creditor of a banker could not insist on seeing all the books of the banker before the debt was established.

LORD ROMILLY, M.R.:—

I am of opinion that the Plaintiffs are entitled to see the Court rolls. It is the right of a tenant of a manor to see the Court rolls. They are public documents, and belong to him; and if the Plaintiffs are not tenants of the manor, the Defendants ought to have raised that defence by a plea. The case is not at all analogous to that of a person asking to see the books of a bank, because the proceedings against the bank must be confined to questions of account between a customer and the bank; but this is a question of what the custom of the manor is. If there were a question whether a particular bank, by uniform custom, had bound themselves by a particular mode of dealing with customers, then the mode in which they dealt with other customers would be proper to be disclosed, and would be evidence to be taken in the cause. So here the question is,

(1) 3 T. R. 141. (2) 22 Beav. 125, 2 Jur. N.S. 824.
(3) Pages 46, 53, 123, 140.

what is the custom of the manor? and accordingly, for the purpose of deciding that, all the Court rolls must be examined. It is impossible to say that the lords of the manor may avoid disclosing the Court rolls, or prevent any examination of them, by an assertion that the Court rolls do not shew the title of the Plaintiff, when the title of the Plaintiff consists of his being tenant of the manor, and the question is, what, by the custom of the manor, are the rights of tenants of the manor over the waste lands.

Solicitor for the Plaintiffs: Mr. *P. H. Lawrence.*
Solicitors for the Defendants: Messrs. *White, Borrett, & White.*

V.-C. W.
1867
Feb. 15, 26.

RICHARDSON *v.* RICHARDSON.

Voluntary Deed—Gift of Personal Estate—Promissory Notes, not indorsed over, whether they pass—Declaration of Trust.

E. by a voluntary deed, in 1858, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever," of her, the said *E.*, to *R.* absolutely; and she thereby appointed *R.*, his executors, administrators, and assigns, her attorney and attorneys in her name, but for the sole benefit of *R.*, to sue for and recover the thereby assigned premises and every part thereof, and to do and execute all such acts and deeds as should be necessary for deriving the full benefit of the assignment thereby made. At the date of the assignment, *E.* was possessed of (amongst other property) certain promissory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon *R.*'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by *E.* to *R.*:—

Held, that the property in the notes passed by the deed to *R.*, on the principle that the deed of assignment operated as a complete declaration of trust by *E.* of all her property in favour of *R.*

THIS bill was filed by *Joseph Richardson*, a legatee of £1250, under the will (dated the 1st of March, 1864) of his brother, *Richard Richardson*, who died on the 14th of April, 1864, against *John Richardson*, *John Severs*, and *Richard Mills*, the executors of the will, praying for payment of the legacy and interest.

The Defendants, the executors, claimed a set-off against the legacy of a sum of £450, with interest at £5 per cent. (upon £200, part of the sum, from the 26th of June, 1845, and upon £250, the residue, from the 23rd of September, 1851), in respect of two promissory notes of the above dates respectively given by the Plaintiff to his sister, *Elizabeth Richardson*, to secure £200 and £250 respectively advanced by her to the Plaintiff.

By a voluntary deed, dated the 17th of April, 1858, and made between *Elizabeth Richardson* of the one part, and the testator of the other part, *Elizabeth Richardson* granted, conveyed, and assigned to the testator, his heirs, executors, administrators and assigns, certain hereditaments held by her on mortgage, and also the mortgage debts and interest, and "all other the personal

estate and effects whatsoever and wheresoever of her, the said *Elizabeth Richardson*," and all the estate, &c.; to hold the said hereditaments thereinbefore conveyed to and to the use of *R. Richardson*, his heirs and assigns for ever, subject to such right and equity of redemption as the same were then subject to; and to have, hold, receive, take, and enjoy the said several principal mortgage debts and interest, personal estate, effects, and premises thereinbefore assigned unto the said *R. Richardson*, his executors, administrators and assigns, to and for his and their own absolute use and benefit. And *Elizabeth Richardson* thereby constituted and appointed *Richard Richardson*, his executors, administrators, and assigns, her true and lawful attorney and attorneys in her and their name or names, but for the sole and absolute benefit of *Richard Richardson*, to ask and demand, sue for, recover, and receive, and to give good and effectual receipts and discharges for, the thereby assigned moneys and premises, and every or any part thereof, and generally for *Richard Richardson*, his executors and administrators, to make, do, and execute all such other acts, deeds, matters, and things as should be deemed necessary for deriving the full benefit of the assignment thereinbefore contained; and *Elizabeth Richardson* thereby covenanted that she, her heirs, executors, and administrators, would from time to time, and at all times thereafter, upon every reasonable request, at the costs and charges of *Richard Richardson*, his heirs, executors, administrators, and assigns, make, do, and execute, and perfect, or cause and procure to be made, done, executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, conveyances, assignments, and assurances in the law whatsoever for the more effectually conveying and assigning or otherwise confirming the hereditaments, moneys, personal estate, and premises unto and to the use of *Richard Richardson*, his heirs, executors, administrators, and assigns, in manner aforesaid, as by him or them, or his or their counsel in the law, should be reasonably advised or required.

Elizabeth Richardson died on the 21st of April, 1858, and after the testator's death, the notes in question were found amongst his papers, though not indorsed to any one.

The Plaintiff contended that all remedy upon the notes had been barred by the *Statute of Limitations*, and that the testator

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purposely allowed the remedy to become barred, in order that he might release the Plaintiff from all obligation in respect of them. No demand for principal, interest, or acknowledgment, was ever made upon the Plaintiff, nor did he ever pay anything in respect of the notes. The testator also left a list of his property, which, though very particular, contained no mention of the notes.

The Defendants, by their answer, disputed the fact that no interest had been paid, alleging that the accounts shewed certain payments which must have been made in respect of interest. They also said that *Elizabeth Richardson* executed a will, dated the 21st of October, 1852, whereby she bequeathed several legacies, and gave the residue of her property to her executors upon certain trusts, and appointed the testator and the Plaintiff her executors.

The Plaintiff amended the bill, and further stated that the deed of assignment was only executed to save the expenses of probate, and that by another and last will, dated the 10th of July, 1855, *Elizabeth Richardson* divided her property equally between two of her brothers, the Plaintiff and the Defendant *John*, and her sister *Sarah Brown*, and their children, and appointed the testator sole executor; also that the said distribution was duly made by the testator in conformity with the provisions of such last-mentioned will, but that the Plaintiff received nothing, because his share was treated as covered by the alleged debts on the notes. He also charged that the testator had been directed by *Elizabeth Richardson* to allow the remedy upon the notes to expire by lapse of time, and to destroy them.

The Defendants' contention was, that the notes passed by the deed of assignment to the testator, and became part of his assets; so that whether the right to sue upon them was or was not barred, there was a right to set them off against the legacy. They also disputed the statement as to the intention of the testator to let the remedy become barred, and denied that any trust was created by *Elizabeth Richardson*.

Neither of the wills of *Elizabeth Richardson* had been proved, nor were the instruments produced, or their absence accounted for.

On the question of the testator's intention, the following state-

ment made by the Defendant *John Richardson*, the executor, in his answer, was commented on:—

"I say that two or three days before the testator's death, I had a conversation with the testator, at his house at *York*, principally about our sister *Sarah Brown*, and that at the conclusion of such conversation, the testator said to me, 'These notes, I don't know what to do about them;' and that I then said, 'What notes?' to which the testator replied, 'These notes of *Joseph's*; what am I to do about them?' And that I then said, 'Do what you think right about them;' and that after a pause the testator said, 'They had better remain where they are, in my desk; they probably will not be wanted, and if not, you had better see that they are done away with.' And the testator shortly afterwards remarked that he was afraid *Joseph* would be dissatisfied, and when I said, 'Why?' he replied, 'I am afraid so,' or used words to that effect."

Mr. *G. M. Giffard*, Q.C., and Mr. *Kay*, Q.C., for the Plaintiff:—

The questions are three: First, whether the notes passed to the testator by the voluntary deed; secondly, if they did pass, whether the testator took them impressed with a trust by *Elizabeth Richardson*, either that they should be destroyed, or that the proceeds of them should be distributed with the rest of her property in the mode indicated by her will; thirdly, if the testator took them absolutely, whether it was his intention that they should ever be enforced.

On the first point, we say that the deed did not pass the notes, there having been no indorsement. However far *Kekewich* v. *Manning* (1) may have gone, it has never yet been held that a voluntary deed of gift will, in the view of this Court, be held to pass a *chose in action*, which is incapable of being passed by deed at common law. In this case delivery of the notes would, at least, be necessary; but that is not proved. *Edwards* v. *Jones* (2), before Lord *Cottenham*, remains untouched by *Kekewich* v. *Manning*: *Gilbert* v. *Overton* (3).

If the notes did not pass by the deed, the testator could claim them only as executor of *Elizabeth*, and he did not take out pro-

(1) 1 D. M. & G. 176. (2) 1 My. & Cr. 226.
(3) 2 H. & M. 110; 10 Jur. N.S. 721.

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bate. Even if the executors should take out probate, they will take only subject to the payment of *Elizabeth's* debts and testamentary expenses. The executors cannot set off a legacy under the testator's will against a derived claim which his estate may have against the legatee: *Freeman* v. *Lomas* (1).

But if the deed be held to have passed the notes, then we say, secondly, upon the evidence, that they came to the testator impressed with a trust either (as seems most probable, from *Elizabeth* never having demanded payment or interest) that they should be destroyed, or that their proceeds should be distributed in the manner pointed out by the will, the deed having been executed to evade probate duty.

Should it, however, be held that the testator took the notes absolutely, then there is evidence to shew that he released the debt; as was held in *Gilbert* v. *Wetherell* (2).

On either ground, there can be no set-off: *Courtenay* v. *Williams* (3).

The VICE-CHANCELLOR said he would not call upon the Defendants as to the question of trust, but would hear them upon the point whether the notes ever became part of the testator's assets.

Mr. *Willcock*, Q.C., and Mr. *Faber*, for the Defendants:—

The language of the deed is quite sufficient to pass what is capable of being passed as a *chose in action*. No doubt the mode of transfer at law is by indorsement, but where there is an assignment, accompanied by a power of attorney, and followed by a covenant for further assurance, indorsement is unnecessary.

This deed, moreover, was an appointment coupled with an interest, and was irrevocable.

A promissory note, though unindorsed, may be the subject of a *donatio mortis causâ*: *Veal* v. *Veal* (4).

It is said that delivery cannot be proved. But a power of attorney is as good as delivery.

Fortescue v. *Barnett* (5), which is approved in *Kekewich* v. *Manning*, is an authority for the proposition that a voluntary assign-

(1) 9 Hare, 109.
(2) 2 S. & S. 254.
(3) 3 Hare, 539.
(4) 27 Beav. 303; 1 Jur. N.S. 827.
(5) 3 My. & K. 36, 42.

ment of a bond, where the bond is not delivered, but kept in the possession of the assignor, will constitute the assignor, in this Court, a debtor to the assignee.

Upon the evidence, it is apparent that the testator's mind fluctuated, but he never arrived at a settled intention.

Mr. *Giffard*, in reply :—

It has been said that the deed of April, 1858, was irrevocable; but it would be a monstrous thing to say that, because you once constitute your clerk or solicitor your agent to receive money, you cannot revoke the appointment. It has been said that the appointment was coupled with an interest. But that is begging the whole question. No interest passed at law. All *Elizabeth Richardson* could have done would have been to sue in *Richard's* name for the debt, and that would not have interfered with her power of revocation. If there was no intention to pass these notes, then *cadit quæstio;* if there was an intention, then an immediate transfer was intended, which was never effected. The power of attorney does not extend to the executors of *Elizabeth*, and *Richard Richardson* himself never took out probate of *Elizabeth's* will, or took any steps to perfect his title. He never shewed that he considered himself entitled to this property as his own.

The set-off cannot be established, on two grounds: one, that in point of fact these notes are the assets of *Elizabeth*, and did not pass by the deed; secondly, that the deed only passed such an interest in *Elizabeth's* personal estate as would remain after payment of her debts, funeral, and testamentary expenses.

[*Searle* v. *Law* (1) was also cited.]

Feb. 26. SIR W. PAGE WOOD, V.C. :—

The sole question in this case is, whether a legatee, under the will of the testator, *Richard Richardson*, of a sum of £1250, ought or ought not to submit to a deduction of £450, in respect of two promissory notes given by him to his sister, which involves the further question, whether the testator was or was not the absolute

(1) 15 Sim. 95.

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owner of the notes. If he was the owner, though he demanded no interest upon the notes, and made no application for payment of them, yet, as is conceded, the *Statute of Limitations* cannot be set up, and the Plaintiff must be considered as having received on account of his legacy so much of the assets of the testator as his debt amounted to.

Whether or not the notes were the property of the testator, depends upon a certain voluntary assignment, whereby the sister, shortly before her death, assigned the whole of her personal estate to her brother, the testator, and in the same instrument she gave him a power of attorney to ask, sue for, and recover, the thereby assigned moneys and premises, and to do and execute such further acts and deeds as should be deemed necessary for deriving the full benefit of the assignment.

Now there is no specific description in the deed of the promissory notes, and, if they passed at all, they passed under the description of "all other the personal estate and effects, whatsoever and wheresoever," of *Elizabeth Richardson*. She did not indorse the notes, and the Defendants, the executors, by their answer, say they believe that if she had not died so soon, the testator would have applied to her to indorse the notes, but she did not do so. The questions are: first, whether they passed by the deed at all; and, secondly, if they passed, whether they passed to the testator as trustee, or in his own right.

16 Eq 346

After the decision in *Kekewich* v. *Manning* (1), I think it is impossible to contend that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to *Ex parte Pye* (2), was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust.

It is impossible to read the argument in that case, and the judgment of Lord Justice *Knight Bruce*, without seeing that his

(1) 1 D. M. & G. 176. (2) 18 Ves. 140.

mind was directed to *Meek* v. *Kettlewell* (1), and that class of cases, where it had been held (such was the nicety upon which the decisions turned) that an actual assignment is nothing more than an agreement to assign in equity, because it merely passes such equitable interest as the assignor may have, and some further step must be taken by the assignee to acquire the legal interest. That further step being necessary, the assignment was held to be, in truth, nothing but an agreement to assign; and being so, was not enforceable in this Court, the Court having often decided that it will not enforce a mere voluntary agreement.

The distinction, undoubtedly, was very fine between that and a declaration of trust; and the good sense of the decision in *Kekewich* v. *Manning* (2), I think, lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything, independently of the legal estate. It was held in *Kekewich* v. *Manning* that such an instrument operates as an out-and-out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the Lords Justices is this: "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument."

In that case, reference was made in the argument principally to the case of *Ex parte Pye* (3), which was a decision of Lord *Eldon* to the same effect. Reliance is often placed on the circumstance that the assignor has done all he can, that there is nothing remaining for him to do; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for if there be an actual declaration of trust, although the assignor has not done all that he could do—for example, although he has not given notice to the assignee—yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: aye or no, has he constituted himself a trustee?

(1) 1 Hare, 464; on appeal, 1 Ph. 342. (2) 1 D. M. & G. 176.
(3) 18 Ves. 140.

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In *Ex parte Pye* (1), the testator had written to one *Dubost*, authorizing him to purchase in *France* an annuity for the benefit of a lady named *Garos*, for her life, with power to draw on him for £1500 for such purchase. The agent, finding the lady was a married woman, exercised his own discretion, and bought the annuity in the name of the testator. Then, shortly before his death, the testator sent to *Dubost*, by his desire, a power of attorney, authorizing him to transfer the annuity to the lady. The testator died before anything more was done, and after his death the annuity was transferred. There was a question whether, by the law of *France*, the exercise of a power of attorney by the person to whom it is given, without knowledge of the death of his principal, is good. I think the Master found that it was so; but Lord *Eldon* expressly declined to rely upon that, as he says in his judgment (2): "These Petitions" (the question came on upon Petition) "call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court. With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitant."

Now, the testator had done nothing more than execute the power of attorney. It is true he had written a letter directing the stock to be purchased in the lady's name; but that was not done, it was purchased in his name. The decision, therefore, could only be rested upon this, that this was not an agreement to assign, not an agreement to become a trustee at some future period, but an actual constitution by the testator of himself as trustee.

Following, therefore, *Kekewich* v. *Manning* (3), I must regard this instrument as having effectually assigned the promissory notes, although they were not indorsed. The instrument is an actual assignment, with a power immediately vested in the assignee to

(1) 18 Ves. 140. (2) Ibid. 150. (3) 1 D. M. & G. 176.

make himself master of the property; and I do not know in what way the assignor could have more effectually declared that she was a trustee of that property for *Richard Richardson.*

The next question is, whether the testator took these notes upon trust, for if he did, there can be no set off of the debt due to him *quâ* trustee, against the legacy given by his will. It appears to me there is nothing whatever on the face of the instrument to create a trust. The property is given out-and-out, absolutely; nor do I find anything like evidence to authorize me to say that it is fixed with a trust. [His Honour reviewed the evidence, and came to the conclusion that a will had been executed in 1855, although the instrument itself had not been produced, nor its absence accounted for. His Honour thought it very possible that the assignment was executed for the purpose of avoiding the duty, and disposing of the property through the medium of a trust; but he did not think the evidence sufficient to fasten that trust upon the property, no right having been asserted, during the period from 1858 to 1864, as against the testator. His Honour continued:—]

It was said by Mr. *Giffard,* in another part of his argument, relying on the case of *Freeman* v. *Lomas* (1), that if the testator could not take this property, except through the executors of *Elizabeth Richardson,* if he could not take the notes specifically, but could only take their value as an ordinary legacy after a settlement of accounts with the executors of *Elizabeth Richardson,* the testator's executors are not in a position to assert a right of set-off as regards these specific notes. But I have already stated my reasons for considering that there is no evidence to shew that the testator did not take these notes absolutely by the deed; and as regards the application of the moneys secured on the notes to the payment of debts, that would only arise in consequence of the possibility of the statute of *Elizabeth* intervening, which might take out, for the benefit of the creditors, as much of the property as might be wanted for the payment of debts; but as regards the donee and donor, the deed would remain absolute, no debt ever having been asserted, and the property having been completely and effectually assigned.

As regards some faint evidence of the testator's wish that this

(1) 9 Hare, 109.

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debt might not be enforced, no doubt the testator never received interest, and he was in a vacillating frame of mind about it; but unfortunately that vacillation never amounted to anything definite or precise, amounting to a gift of the property.

[His Honour went through the evidence on this head, and continued:—]

Although I am very reluctant to come to this conclusion, I must say the testator does not appear to me to have made up his mind; and as he did not do so, I cannot do anything for the Plaintiff. Therefore the legacy must be paid, deducting the value of the notes; but of course there will be no interest on them. The order will be to pay the Plaintiff his legacy of £1250, less £450, with interest at £4 per cent. on the difference, from one year after the testator's death. There will be no costs on either side, except that the Defendants will have their costs out of the estate.

Solicitors for the Plaintiff: Messrs. *Bell, Brodrick, & Bell*, agents for Messrs. *Weatherhead & Burr, Keighley.*

Solicitors for the Defendants: Messrs. *Williamson, Hill, & Co.*, agents for Mr. *J. P. Guy, York.*

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NICHOLL *v.* JONES.

Specific Performance—Married Woman—Contract affecting her Real Estate.

By the will of *A.*, made in 1838, real estate was appointed to *B.*, a married woman. By a subsequent will, of 1858, the whole of *A.*'s property, real and personal, was given to *E.*

The will of 1858 was propounded by *E.*, and proof was opposed by *D.*, the heir-at-law of *A.* Issue was joined in the Probate Court, and a trial took place, in the course of which a compromise was come to, the effect of which was, that *E.* gave up his suit, and abandoned all benefit under the will of 1858 in consideration of receiving £15,000 out of the estate. The agreement for a compromise, which was afterwards made a rule of Court, was signed by *E.*, by *C.*, husband of *B.* (who was present in Court, though not a party to the litigation), for himself and wife, and by *X.*, *D.*'s attorney, for *D.* and *B.*, though without any express authority from *B.*:—

Held, that although *B.* had adopted and acted upon the agreement, and

was enjoying the property under it, *E.*, who was aware of her position as a married woman, and her inability to bind her real estate except in the way prescribed by law, could not enforce it against her, and that, in the absence of such formal ratification, everything that had been done must be regarded as the act of the husband alone.

THIS was a suit for the purpose of enforcing specific performance of an agreement for a compromise (under which certain rights were reserved to the Plaintiff) of matters in litigation in the Court of Probate, entered into between the Plaintiff and the Defendants, *John Jones* and *Eliza*, his wife, and *David Davies*, or for relief in an alternative form.

In April, 1838, the Plaintiff, *David Fryor Nicholl*, married *Margaretta Bowen Davies*, and by their marriage settlement freehold and leasehold property, to which *Margaretta Bowen Davies* was entitled, was settled, as to a part, for a term of ninety-nine years, upon trust to secure an annuity of £100 a year to the Plaintiff, with a proviso for cesser if the Plaintiff should live separate and apart from *M. B. Davies*, and, subject to the said term, the whole to such uses as Mrs. *Nicholl* should appoint by deed or will, there being a covenant by the Plaintiff that it should be lawful for his intended wife (*M. B. Davies*) during coverture to exercise, from time to time, all powers of appointment which might accrue to her during such coverture.

By her will, dated the 18th of August, 1838, *Margaretta Nicholl*, after giving the sum of £1000 to her husband, appointed all her residuary real and personal estate, with certain exceptions, in default of children of her marriage, to *Bowen Davies* for life, with remainder to his children, and, in default of such issue, to *Henry Jones* and the Defendant *Eliza Jones* (wife of *John Jones*) equally, as tenants in common in fee.

By a codicil to this will, of the same date, it was declared that the devise and bequest to *Henry Jones* and *Eliza Jones* should take effect only on their attaining twenty-one, and that on the death of either under that age the whole residue given by the will should go to the survivor.

Bowen Davies died without having had issue, in May, 1848, and *Henry Jones* died under twenty-one, in the lifetime of the testatrix.

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On the 15th of October, 1858, Mrs. *Nicholl* signed the following writing:—

"I give and bequeath to my dear husband, and forgive him all his unkindness to me, all my goods and chattels whatsoever."

She also signed, in the presence of five attesting witnesses, a testamentary paper, dated the 16th of October, 1858, whereby she gave all her real and personal estate, whatsoever and wheresoever, unto her husband, his heirs and assigns, for ever, and appointed him sole executor, revoking all other testamentary writings.

Mrs. *Nicholl* died on the 17th of October, 1858, and shortly afterwards the suit of *Nicholl* v. *Davies* was instituted in the Probate Court against *David Davies* (claiming to be heir-at-law of Mrs. *Nicholl*), for the purpose of proving the will of the 16th of October, 1858. Such proof was opposed by *David Davies*, and issues were joined in the suit.

The issues came on to be tried in the Court of Probate before Sir *Cresswell Cresswell* and a special jury on the 12th of May, 1859.

David Davies, who had instructed Mr. *Lewis Morris*, of *Carmarthen*, as his solicitor, was at the time unwell, and unable to be in *London* for the trial, but *John Jones*, who, with his wife, the appointee under the will of 1838, was interested, in common with *David Davies*, in contesting the will of 1858, and had given a bond to *D. Davies*, to bear part of the expenses of the litigation, was, though not a party to the suit, in Court during the trial.

On the 14th of May, the third day of trial, at the conclusion of the Plaintiff's case, and during the absence of the Judge for lunch in the middle of the day, a compromise in the following terms, was come to between the parties:—

"Verdict by consent for the Defendant upon the following terms: Plaintiff to receive his own costs, and to abandon the £1000, and the annuity of £100 mentioned in the will of 1838 and settlement; to account immediately for all personalty and rents received since death of Mrs. *Nicholl*, and Defendant thereupon to pay the debts of the deceased. The amount of £15,000, with interest at 5 per cent. from this date, to be paid within twelve months from this date out of the estate. If any question arises upon this agreement, and the mode of carrying out the terms and effectuating its

objects, the same to be referred to Mr. *Hayes*, conveyancer; or, if he should be unwilling to undertake it, to some other person, to be appointed by Mr. *James* and Mr. *Hawkins*. Possession of the property and deeds to be given up by Plaintiff immediately. Each party to pay his own costs of carrying out this agreement. This agreement to be made a rule of this Court. Mr. *Nicholl* to give up all claim under any testamentary disposition whatever. Plaintiff to have the trinkets, wardrobe, and library of the deceased.

"14th May, 1859.

"*D. F. Nicholl.*

"*Lewis Morris*, attorney for the Defendant, and *Eliza Jones*, of *Pant.*

"*John Jones*, for self and wife."

On this arrangement being completed, the special jury, by direction of the Judge, returned a verdict establishing the invalidity of the testamentary paper of the 16th of October, 1858, and the arrangement was afterwards drawn up as a rule of Court and signed by the proctors for the Defendant (*David Davies*).

The Plaintiff, *D. F. Nicholl*, at once gave up to Mr. and Mrs. *Jones* the title deeds of the property, and the personal chattels, in performance of his part of the arrangement, which was for some time, as the bill alleged, recognised and acted upon as binding upon *Eliza Jones* and her husband, who took possession accordingly, although no payment of the £15,000, or of any interest thereon, had ever been made to the Plaintiff.

In the spring of 1860 certain proceedings took place in the Court of Probate, upon a motion of the 27th of March, 1860, on behalf of *David Davies*, that the rule of Court in *Nicholl* v. *Davies* might be rescinded or suspended, on the ground that the compromise had been entered into and made a rule of Court without his authority or sanction. In the course of these proceedings, which, from the numerous adjournments, motions, and cross motions, were of a very complicated character, Mr. *Morris* appears to have informed the proctors of the Plaintiff, *D. F. Nicholl*, that he could not allow or advise Mrs. *Jones* to be a party with *David Davies* to any arrangement for varying or carrying out the compromise. On the 9th of May, 1860, an order was made by the Court of Probate

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varying a previous order of the 18th of April, by adding these words: "It is understood that the debts of the testatrix are to come out of the general estate; the £15,000 to come out of the estate in proportion to the interest of the parties."

Counsel appeared on behalf of Mr. and Mrs. *Jones* in March, and again on the 9th of May, 1860, and did not oppose the order, but Mr. and Mrs. *Jones* both denied that they authorized Mr. *Lewis Morris* to instruct counsel on their behalf. Mr. *Morris's* statement was, in effect, that counsel were instructed by him to watch the case on behalf of Mrs. *Jones* on the 27th of March, 1860, were not instructed, and did not appear, on the 18th of April, 1860, and that although he neither instructed, nor had authority to instruct, counsel for the 9th of May, 1860, it was thought desirable by the *London* agent, in consequence of the Judge's observations as to the absence of Mr. and Mrs. *Jones* on the 18th of April, to instruct counsel to appear for them, on the motion of the 9th of May, 1860, "to explain why Mr. and Mrs. *Jones* were not represented."

On the 7th of July, 1860, an order was made by the Court of Probate in a suit of *Jones* v. *Davies*, establishing the will and codicils of *Margaretta Bowen Nicholl*, dated the 18th of August, 1838, as her last testamentary dispositions; and on the 10th of August, 1860, letters of administration with the said will and codicils annexed (limited to such personal estate as the testatrix had power to dispose of by virtue of her marriage settlement, and was disposed of by such will and codicils) were granted to the Defendant *Eliza Jones*. Shortly after this time the suit of *Hughes* v. *Jones* was instituted, for the purpose of establishing a claim by *Margaret Hughes* to be heir-at-law of *Margaretta Bowen Nicholl*, and for consequential relief. Issues were directed, and tried at *Carmarthen* Summer Assizes, in July, 1862, and a verdict was returned establishing the title of *Mary Hughes* as heir-at-law of Mrs. *Nicholl*, and displacing that of *David Davies*. Certain subsequent proceedings were taken in *Hughes* v. *Jones* (1), but upon the question of heirship a compromise was entered into between *Mary Hughes* and *David Davies*, under which it was agreed to terminate all

(1) See, on the hearing on further consideration, *Hughes* v. *Jones* (1 H. & M. 765).

litigation between them, and that on receiving £2000 and his costs *David Davies* should execute a release and conveyance of all his rights and interests in Mrs. *Nicholl's* estates.

Mr. and Mrs. *Jones* had, subsequently to the proceedings in *Hughes* v. *Jones*, declined to carry out their part of the agreement with the Plaintiff, on the ground that it was entered into under the mistaken belief, then common to all parties, that *David Davies* was heir-at-law of Mrs. *Nicholl*, and had duly authorized such agreement to be made on his behalf, and that all the estates over which Mrs. *Nicholl* had a disposing power (whether appointed or not) would be bound, and that the £15,000 was to come out of the *corpus* of all such estates rateably, and that it never was intended to make liable that portion only which was appointed to *Eliza Jones*. It was also alleged that Mrs. *Jones* had never authorized her husband, or *Lewis Morris*, to enter into the compromise, or to sign the arrangement on her behalf, and had never, in any manner, recognised or ratified such arrangement.

Under these circumstances the Plaintiff had filed his bill, praying specific performance of the agreement for a compromise, and a declaration that, subject to payment of her debts, all the real and personal estate of Mrs. *Nicholl*, appointed by her will of 1838, to *Eliza Jones*, and all her unappointed real estate, were properly charged with payment of the £15,000 and interest thereon. The bill also prayed, alternatively, that, in case such agreement could not be specifically performed, the Plaintiff might be declared entitled to have the £1000 and interest from the death of Mrs. *Nicholl*, and all sums received by her in respect of the annuity of £100 raised and paid out of the real and personal estate bequeathed, devised, and appointed, by her said will, and provision made for payment in future of the annuity, and the arrears thereof, out of the estates charged therewith.

Mr. and Mrs. *Jones*, in their answers, repudiated any authority to *Morris* to act on their behalf, and insisted that the compromise did not bind the estates to which Mrs. *Jones* had become entitled, or the life interest of *John Jones* in such estates in right of his wife. *Mary Hughes*, who was also a Defendant, and Mrs. *Jones*, denied any knowledge of, or concurrence in, the compromise in *Nicholl* v. *Davies*, and repudiated any liability under the arrangement.

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David Davies, since deceased, had admitted that *Morris* acted for him as his solicitor down to July, 1859, but denied having ever authorized *Morris* to enter into the compromise.

Evidence was adduced on behalf of the Plaintiff, for the purpose of shewing that Mrs. *Jones* was not only aware of, but had expressly recognised, the compromise from the first, and acted on the assumption that it was strictly binding upon her. In particular, evidence was given that about the end of May, 1859, when the personal property of Mrs. *Nicholl* was being delivered up to her and her husband, some discussion arose as to the linen and plate; *John Jones* was willing that the Plaintiff should have them, but *Eliza Jones* insisted that "it was not written in the bond," and that she would stand strictly to the compromise as it was, and nothing more.

In reference to the authority for signing the terms of compromise on behalf of Mrs. *Jones*, Mr. *Lewis Morris*, attorney, of *Carmarthen*, stated in his evidence that he had acted as the solicitor of *David Davies* in the suit of *Nicholl* v. *Davies*, but that he had no instructions or authority from Mrs. *Jones* in reference to the trial or suit. During the discussion of the terms of compromise, he stated that he had no authority to enter into any compromise, or to sign the memorandum on behalf of *Eliza Jones*, but that he was willing to sign on her behalf if *John Jones* would do so likewise, and *John Jones* having acquiesced, he signed as well on behalf of *Eliza Jones* as on behalf of *David Davies*. He also stated in his affidavit that he had not, in fact, any instructions or authority whatever from *Eliza Jones* to enter into the compromise or arrangement, or any other agreement, compromise, or arrangement, on her behalf; that he ventured to sign on her behalf because he thought that, as it met with her husband's concurrence, it would probably meet with hers, and because, after a compromise was suggested, there was no opportunity of communicating with her, or ascertaining her views.

The *Attorney-General* (Sir *John Rolt*), Mr. *G. M. Giffard*, Q.C., and Mr. *E. R. Turner*, for the Plaintiff, contended that Mr. and Mrs. *Jones* were bound by the compromise. With the written consent of *Lewis Morris*, acting on behalf of *David Davies*, and signing for

Mrs. *Jones* also, and the written consent of *Jones* on behalf both of himself and his wife, this compromise was entered into, under which the Plaintiff divested himself of all his rights under the will of 1858, and handed over the estates to Mr. and Mrs. *Jones*, and Mrs. *Jones* could not, under the plea that she was a married woman, escape from paying the stipulated price for the benefits acquired, and still enjoyed by her, under this arrangement. Where there is an equity by which the conscience of a married woman can be affected, there is abundant authority to shew that this Court will not hesitate to deal with her interests in real property; and, generally, no married woman will be allowed to avail herself of fraud: *Barrow* v. *Barrow* (1); *Savage* v. *Foster* (2). Even if the compromise could not bind Mrs. *Jones's* interest, it would operate to the extent of her husband's life interest in the property: *Wainwright* v. *Hardisty* (3).

Mr. *Osborne*, Q.C., and Mr. *William Pearson*, for the Defendant, *John Jones*, contended that the Court could not decree specific performance of this agreement, as it was materially varied by the order of the 9th of May, 1860, to which neither *Jones* nor his wife were parties, and that the Plaintiff, by obtaining this order, after notice was given that *Jones* withdrew from the compromise, had contracted himself out of any right to relief. It was of the essence of the agreement that all questions upon it should be referred to Mr. *Hayes*, but as he had given no decision, and had not even been consulted, the Court could not take upon itself specifically to perform the agreement: *Tillett* v. *Charing Cross Bridge Company* (4).

Assuming that Mrs. *Jones's* estate was not bound, the Court could not enforce it *cy près*, by making the life estate of Mr. *Jones* alone liable, as it was not expressed in the contract that the interest of *Jones* alone should be bound, and he had not contracted or held himself out as owner of the whole: *Price* v. *Griffith* (5); *Casamajor* v. *Strode* (6); the cases in which the Court enforced a contract partially being, where a vendor was not able to sell all that he had contracted to sell, and the purchaser was willing to

(1) 4 K. & J. 409; 4 Jur. N.S. 1049
(2) 9 Mod. 35.
(3) 2 Beav. 363.
(4) 26 Beav. 419; 5 Jur. N.S. 994
(5) 1 D. M. & G. 80.
(6) 2 My. & K. 706.

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take what he could get, with compensation for such part as the vendor was unable to convey: *Thomas* v. *Dering* (1).

Sir *Roundell Palmer*, Q.C., and Mr. *Freeling*, for Mrs. *Jones*:—

The agreement was only that of the husband, even at the highest, and the wife cannot be bound. The Plaintiff was acting at the time with advice at hand, and must have been fully aware of the disabilities attending a married woman, and the impossibility of her binding her estate except *modo et formâ*.

The VICE-CHANCELLOR:—The contention of the Plaintiff, is that she cannot take the benefit of a contract and refuse its liabilities.

Sir *R. Palmer*:—She took no benefit under the contract; she was no party to the suit in which it was made; she simply stood upon her rights; she took under the will of 1838. If money be lent, or goods sold, to a married woman, it is clear that the creditor cannot recover the money lent, or the value of the goods, from her: *Vaughan* v. *Vanderstegen* (2), and the Court has no power to bind the real estate of a married woman except by the formalities prescribed by law for that purpose: *Field* v. *Moore* (3); *Lassence* v. *Tierney* (4); *Oldham* v. *Hughes* (5); and the protection thus thrown around a married woman will not be interfered with unless a case of active fraud is shewn, of which, according to *Barrow* v. *Barrow* (6), and *Savage* v. *Foster* (7), she will not be allowed to avail herself. But the bill contains not a single allegation on which a case of fraud can be raised against Mrs. *Jones*. Mere acquiescence, or the circumstance, for that is the highest at which it can be put, that she did not inform the Plaintiff that she would not be bound by the arrangement, will not amount to fraud, or be such a misrepresentation as will have the effect of binding her estate. A misrepresentation of intention raises no equity, so as to prevent the person who has made it from enforcing his legal rights, even if the parties to whom such misrepresentations were made, have acted upon them, and, in full belief of them, have contracted

(1) 1 Keen, 729.
(2) 2 Drew. 363.
(3) 7 D. M. & G. 691, 2 Jur. N.S. 145
(4) 1 Mac. & G. 551.
(5) 2 Atk. 452.
(6) 4 K. & J. 409.
(7) 9 Mod. 35.

irrevocable engagements: *Jorden* v. *Money* (1). If Mrs. *Jones* had concealed the fact of her coverture from the Plaintiff, and induced him to enter into the compromise under the belief that she was capable of contracting, then, as in *Savage* v. *Foster* (2), she would not be allowed to set up her coverture against her contract. But here there was no concealment or misrepresentation. The Plaintiff knew her position as a married woman, and that her consent *simpliciter* was inoperative; and therefore any notice of that which was patent to everybody—that she was not bound by the compromise—would have been absurd.

[The VICE-CHANCELLOR:—She purchased from the Plaintiff the surrender of his right to prove the will of 1858, and then she acted upon that purchase.]

She was not advised of her rights. With respect to election, the person to elect must be shewn to have known his rights, and be proved to have done such acts as amount to an election. Mere continuance in possession of the estates appointed by the will of 1838, coupled with non-payment of the £15,000, will not afford any decisive proof of her intention to elect: *Spread* v. *Morgan* (3); and, in any case, the Court will not decide upon the question of election without directing an inquiry as to what will be most beneficial for her: *Roper*, Husband and Wife (4).

Mr. *W. M. James*, Q.C., and Mr. *Waller*, for the representatives of *David Davies*, contended that the compromise of May, 1859, was indefinite in its tenor, and incapable of being performed, and that *David Davies* was not bound by it when it was ascertained that he did not fill the character which he was assumed to fill, and had no such interest in the land as would enable him to join in the arrangement.

Mr. *Daniel*, Q.C., and Mr. *Swanston*, for Mrs. *Hughes*, were only heard upon the question as to the £100 annuity, and cited *Hunter* v. *Nockolds* (5); *H.* v. *W.* (6).

(1) 5 H. L. C. 185.
(2) 9 Mod. 35.
(3) 11 H. L. C. 588.
(4) Vol. i. p. 28, *n.*
(5) 1 Mac. & G. 640.
(6) 3 K. & J. 382.

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The *Attorney-General*, in reply:—

The principle on which we rest our case is, that a married woman cannot buy an estate, agree as to the price, have the estate conveyed to her, enjoy possession of it, and then refuse to pay for it. It is true, that in practice she would not be let into possession of the estate until she had paid the purchase-money; but the case might arise upon an agreement for an exchange of estates. It is not necessary to discuss the cases of how far you can bind the estate of a married woman by her contract. The simple point is, that she cannot enjoy the estate under her bargain with the Plaintiff, and now refuse to pay him the price agreed to be given. She now insists that she is not bound by any contract, but is in under the will of 1838. Her possession, however, is derived from the compromise by which the will of 1858, in course of being propounded by the Plaintiff, was bought off. It is proved to demonstration, upon the evidence, that she had full knowledge of the compromise, and herself insisted upon having it strictly carried out. She has accepted the benefits resulting from it, and cannot be allowed to repudiate the obligations. The objection, that Mr. *Hayes* has not been consulted, is answered by *Gregory* v. *Mighell* (1), and by the fact that the Plaintiff has performed his part of the agreement, and given up all that he could give up.

Nov. 23. SIR W. PAGE WOOD, V.C., after stating the object of the suit, continued:—

The position of all the persons concerned and interested in the testatrix's property at the time the arrangement, which the Plaintiff seeks by the present suit to enforce, was come to, was this:—The two instruments of 1858 having been propounded, Mr. *Lewis Morris*, who acted as the solicitor of the heir-at-law, was placed in communication with Mr. and Mrs. *Jones*, and they were informed of the interest which they had in the litigation that was about to take place. Of course, if the instrument of 1858 could have been displaced, it made way for the prior instrument of 1838, and, with regard to the value of the estates comprised in the instru-

(1) 18 Ves. 328.

ment of 1838, it became of as much, or more, importance to them than to the heir himself, to see if the will of 1858 could be displaced. Unlike the will of 1858, the will of 1838 did not dispose of the whole of the testatrix's property over which she had a disposing power. There was a residuum which would come to the heir-at-law, and consequently Mr. and Mrs. *Jones* on the one hand, and *David Davies* on the other, had an interest in opposing the will of 1858. *David Davies* was the only party on the record, but *Jones* undertook, on behalf of himself and his wife, to bear a portion of the expenses of the litigation, and gave his bond to *Davies* to that effect, and Mr. *Morris* acted on behalf of *Jones*, and, as far as *Jones* could authorize him, on behalf of Mrs. *Jones* also. So far, I say, as *Jones* could bind his wife and give any authority on her behalf, he authorized *Morris* to act for both their interests, and at no time, as it appears to me, until the will of 1838 had been finally established, was there anything which would lead the Plaintiff to suppose that any doubt could exist that *Lewis Morris* was acting on behalf of *David Davies* and of Mr. and Mrs. *Jones* in the transaction which took place.

Now, when the trial in the Court of Probate had proceeded to the extent that all the witnesses for the Plaintiff had been examined, it was thought fit by all parties to come to an agreement, which, entered into as it was at the moment when the Judge retired in the middle of the day, bears marks of evident haste. [His Honour read the memorandum of compromise of the 14th of May, 1859.] That instrument was signed by the Plaintiff and signed by *Lewis Morris*, "as attorney for the Defendant (*David Davies*) and *Eliza Jones*, of *Pant*," and it was signed by *John Jones* "for self and wife."

Now, as the case stands, irrespective of certain perplexities which arise upon some of the terms of the agreement itself, if this agreement had been between three persons all competent to act for themselves, there would be very little doubt that the Plaintiff would be entitled to relief when he has sacrificed his possession of the property, and given up his right of contesting the will of 1838, which right was valued at £15,000, regard being had to the £1000 that was given up, and to the annuity of £100 a year also to be rescinded. All these very valuable rights were given up,

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and the consequence was, that Mr. and Mrs. *Jones* entered quietly into possession, and from that time down to the time of proving the will of 1838 there does not appear to have been the slightest doubt or suggestion thrown out that this agreement would not be carried out fully and fairly in all its provisions.

I do not forget the passage where it is said that difficulties arose about the rule of Court, *David Davies* trying to discharge, and the Plaintiff to establish the rule. Some variation in the agreement was, it seems, made, but not in a way that would affect Mr. and Mrs. *Jones*, even if Mrs. *Jones* had been competent to enter into any agreement. On that occasion it was discovered, or at least suspected, that *David Davies* was not the heir, and this suspicion was verified in the course of subsequent proceedings in these suits. Thereupon the proctors for the Plaintiff were told that Mr. and Mrs. *Jones* would no longer take any part whatever with reference to the pending application of *David Davies* to discharge the rule, or in any agreement that should be come to with *David Davies* in that respect; but not a word was then said about shrinking from the payment of the price which was contracted to be paid for obtaining the very substantial benefits which had been obtained, nor was one hint of repudiation breathed up to the proof of the will of 1838, from which time forward Mr. and Mrs. *Jones* were in possession of the property. It is, I confess, an extremely painful case, and one that drives to its utmost verge the protection the Court is by law compelled to give to married women. It has been settled from the earliest period, and it is founded on just and sound principles, and not mere technical rules, that a married woman must be protected from any possibility of her right or interest in real estate being affected by the act of her husband. This protection is of course confined to her real estate; but in no other way than with the protection of a private examination to ascertain whether or no she deliberately assents to the arrangements proposed to be made, can her real estate be touched or affected; and every act whatever done in her name, or on her behalf, by her husband, without this protection being thrown around her, is her husband's act, and an act with which she is supposed, in the eye of the law, to have no concern whatever. The exceptions to the rule are rather illustrations of it than otherwise.

If a married woman is sufficiently placed at arm's length from her husband, there are cases (not in reality exceptions, though at first sight appearing to be so) where, as in *Bateman* v. *Countess of Ross* (1), she may enter into engagements with the husband which will bind her. She is also, in case of necessity, and for her own benefit, allowed to elect whether she will take the benefit given to her by a devise or give up something which was supposed by the testator to belong to himself, when in reality it belonged to her. The principle, which is equally sacred with that for the protection of married women, is, that wrong shall not be done by taking a benefit from the testator upon terms which are adverse to those on which he has intended it should be taken. In order that any act of hers, or that any protection afforded to her, may not be allowed to clash with that equally high rule of doing equity with reference to the other instrument which may create election, she is allowed to elect, and her election may be binding on her without the ordinary solemnities which attend the dealings of a married woman with her real estate.

Another exception, which is one of course affecting every rule established for the protection of property, or, rather, is not strictly an exception, but one of those high rules which is absolutely necessary for the protection of property, is that a woman, although married, cannot by fraud obtain for herself, or those claiming under her, any benefit or interest to the detriment of any person whom she may damage by her act. Such was the case of *Savage* v. *Foster* (2), where a married woman, knowing that arrangements as to her property were being made, stood by, while the person making those arrangements, did not know her position, but supposed that he was dealing with a person competent to deal with the whole estate, on the presumption that the married woman had not the slightest interest in it. Applying, therefore, these general principles, is there anything to take this case out of the general rule? In the first place, it is clear that the appearance of *Lewis Morris*, or *Jones*, or any other person, for Mrs. *Jones*, would in itself be only the appearance of Mr. *Jones*, and nothing else. She did not appear separately. She had no separate adviser, and gave no separate instructions. She did not appear in Court at all, beyond her name

(1) 1 Dow. 235. (2) 9 Mod. 35.

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being attached to the instrument by *John Jones*, who attended in Court, neither himself nor his wife being a party to the suit; and whatever may be the effect it was calculated to produce upon the conduct of persons informed of it, that would not, in itself, have the slightest effect. She was informed of the transaction, and has admitted that she knew of the arrangement having been made, as soon as her husband came back. Then comes the act which brings the case to the verge of the authorities. She took possession of this property, and, from the result of the verdict, obtained this benefit, which would not otherwise have been obtained. The difficulty, however, is, that the Plaintiff knew exactly her position, and that she was a married woman, and it is this knowledge which distinguishes the case from *Savage* v. *Foster* (1), where the person complaining did not know that the married woman (who stood by and allowed the estate to be dealt with upon that presumption) had the slightest interest. Mr. *Nicholl* having this knowledge, must be taken to have known that Mrs. *Jones* could not be bound except by a distinct instrument ratifying her assent in the form required by law. The possession so taken must therefore, in the eye of the law, be considered as possession taken by *John Jones* and her. She was acting under her husband in entering into possession with him. The whole is done by *John Jones*, and it must be regarded simply as his act. There is nothing done by her which is not done without full knowledge on the part of the Plaintiff of her exact position; and he must be aware, therefore, that he cannot have the benefit of this contract without some formal ratification of it in the only way in which, by law, a married woman is allowed to contract. It was argued by the Attorney-General as the case of a married woman acquiring property by allowing it to be held out by her husband that she will concur in a certain act. Take the case of two estates, the wife's estate is to be exchanged for another person's estate, and upon the wife being put into possession of that person's estate, she, not having conveyed her own interest away, disposes of her estate elsewhere, and pockets the money. I apprehend the consequence, however much one may lament it, would be, that the protection which the law affords to married women must prevail, and the person so injured would be told that the sale of the estate

(1) 9 Mod. 35.

must be regarded as the husband's own act, and not that of the wife, and, therefore, that her estate cannot be bound. Suppose, on the other hand, the estate had been destroyed by being allowed, for instance, to be used by a railway company; there again, I apprehend, the same rule applies. It is the husband's doing. It is he who has allowed the estate to be destroyed, the wife has not parted with her interest. The point therefore, which must turn the whole case is, that the Plaintiff was aware that Mrs. *Jones* was a married woman, and having that knowledge, he must take all the consequences, however disastrous they may be to him. At the same time I cannot help expressing the strongest opinion on the conduct of those who allowed the matter to go on up to the last moment, taking the full benefit of the arrangement without saying one word, or even hinting, that Mr. *Morris* was not authorized to act. All this was done, and Mr. *Nicholl* was asked to assist in proving the will of 1838, and then, at the last moment, the mask is dropped, and he is told that it had all been done under a delusion.

The case stretches the principle to the very highest extent, but I think it must be so extended. If it were taken to be the act of the husband, all this would be a very gross fraud, but I cannot deal with it on any principle that can affect the interest of Mrs. *Jones* in the estate; with respect to *John Jones* himself, it would be impossible to treat him as doing anything more than bargaining to the extent of his life estate. There was not, however, any contract on his part, that, to the extent of his life estate, he would subject it to the whole of the £15,000, nor can it be put upon this, that he represented that he had authority from his wife to do so. The utmost extent, therefore, to which any relief could have been asked against him in the present case, would be, that he should bear his share of whatever had to be raised, by paying the interest on that sum during his lifetime. It might be a very grave question, whether the estates of persons, not parties to the agreement, as well as those that were, would not have to be charged. It is a question, however, for Mr. *Nicholl*, whether the £100 a-year, and the £1000, which he would have to give up, would not be more than equivalent to any benefit which he might derive on such an hypothesis. But, as regards my decision upon

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the point, it appears to me that I cannot hold Mr. *Jones* alone to this agreement. With respect to *David Davies*, who has been held not to be heir-at-law of Mrs. *Nicholl*, he is out of the way altogether. Looking at the proceedings in May, 1860, by which the agreement was varied, and the position of *Jones* very much changed, I cannot fix *Jones's* life estate with the burden of paying the debts. In truth, the agreement is in such a state, that it would be better for the Plaintiff to get rid of the whole of it as having failed altogether, and to get rid of the verdict as based upon a false state of facts, and under a common mistake of all parties. As to the other Defendant, *Mary Hughes*, there never was any case against her. She has established herself to be the heir, and with the original agreement she had nothing whatever to do. She finds indirectly that she has got the benefit of it, as the will of 1858, which she might have had to contest, has been bought out of the way. But, from the fact that she has settled with a man who was claiming to be heir, I cannot conceive that upon any possible principle any equity can be urged against her. The result is, that the bill, so far as it seeks specific performance against Mrs. *Hughes*, must be dismissed with costs; and against all the other Defendants without costs.

MINUTES.—Dismiss the bill, except so far as it seeks relief in respect of the annuity of £100, with costs, as against the Defendant, *Mary Hughes*, and dismiss the bill generally, without costs, as against the other Defendants; but the Plaintiff, desiring an opportunity to establish the testamentary document dated the 16th of October, 1858, such dismissal to be without prejudice to any question as to such document. Let the sum of £ be paid out to Defendant *J. Jones*, in right of his wife. Vacate security. Deliver up deeds in Plaintiff's solicitor's possession. Declare that the proviso for cesser of the annuity of £100 contained in the indenture of settlement dated the 17th of April, 1838, is void, and is of no force. Declare that the annuity is well charged on the estates *Jortie* and *Coenycoed*. Direct an account of what is due to Plaintiff for his annuity, from the death of *Margaretta Bowen Nicholl*, and if Defendant, *Mary Hughes*, admits the receipt of rents sufficient to pay what shall be found due to Plaintiff for his annuity, order her to pay the same; if not, direct an account of the rents received by Defendant, *Mary Hughes*, from the estates charged with the annuity. Set off the costs of Mrs. *Hughes* against the amount due for annuity. Let the balance due to Plaintiff be raised. Refer it to Chambers to appoint trustees of the term to secure the annuity. Adjourn further consideration.

Solicitors: Mr. *H. Scott Turner*; Messrs. *Loftus, Vizard, & Co.*; Messrs. *Chilton, Burton, Yeates, & Hart*; Mr. *Albert Dixon*.

DEAN *v.* GIBSON.

V.-C. W.
1867
Feb. 22, 26.

Will—Construction—General Words followed by particular Description—Imperfect Enumeration.

Testatrix, a markswoman, made a will, shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." She was possessed at her death, of property, besides cash in hand and clothes, consisting of money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash:—

Held, that the words, "consisting of money and clothes," did not cut down the generality of the gift of "personal property," being only an imperfect enumeration of the particulars of which the personal estate consisted; and that the whole of her personal estate passed by her will.

ALICE GIBSON MAW, spinster, made her will, dated the 14th of June, 1855, in the following terms:

"I, *Alice Gibson Maw*, being perfectly collected and in my right mind, wish to express my earnest desire, that my personal property, consisting of money and clothes, shall be equally divided amongst my three surviving sisters, viz.—*Frances Gibson*, *Knathia Mary Dean*, and *Sarah Taffinder Belton*."

The execution of the will by the testatrix (a markswoman), was attested by the said *Knathia M. Dean*, *Edward Dean*, her husband, and by the said *Sarah T. Belton*, a married woman.

Testatrix died soon after the date of her will, leaving as her next of kin, Mrs. *Gibson*, widow, Mrs. *Dean*, and Mrs. *Belton*, her sisters of the whole blood; and a brother and three sisters of the half-blood.

The bill was filed for administration by Mr. and Mrs. *Dean*, and Mr. and Mrs. *Belton*, against Mrs. *Gibson*, and the four other next of kin.

The testamentary gift having failed as to two-thirds of whatever passed by the will, by reason of the legatees having been attesting witnesses, the Plaintiffs contended that nothing but ready money and clothes passed by the will. Mrs. *Gibson's* representatives (she had since died), on the other hand, contended that all the testatrix's personal estate passed by the will.

At the time of her death testatrix was possessed, besides money

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and clothes, of money out on mortgage, money secured by a promissory note, and a reversionary interest in a sum of money.

Mr. *W. Pearson*, for the Plaintiffs:—

The general gift must be restricted by the particular words. The principle to be kept in view in construing a will of this kind is stated by Lords *Cranworth* and *Wensleydale* in *Grey* v. *Pearson* (1), and the doctrine laid down by them is affirmed in *Baker* v. *Baker* (2), and *Abbott* v. *Middleton* (3); which is shortly this:—That, unless the grammatical construction of the words involves some inconsistency, or absurdity, the Court cannot travel out of the words for the purpose of ascertaining what may have been the presumed intention of the testator. In this case there is no contradiction or absurdity. The expression is not even "all my personal estate," only "my personal estate;" shewing no generality of description.

In *Gascoigne* v. *Barker* (4), Lord *Hardwicke* held that the devise of all a testator's lands, freehold and copyhold, in the parish of *Chiswick*, or elsewhere in the county of *Middlesex*, was restricted by the words which followed in a parenthesis, "which I have surrendered to the use of my will." This was followed by Sir. *R. P. Arden* in *Wilson* v. *Mount* (5). *Roe* v. *Vernon* (6), *Doe* v. *Galloway* (7), and *Doe* v. *Carpenter* (8), are to the same effect.

The VICE-CHANCELLOR asked if there were any cases on the point relating to personal estate.

Mr. *W. M. James*, Q.C. (*amicus curiæ*), referred to *Cambridge* v. *Rous* (9).

Mr. *Pearson*:—In the case of *In re Kendall's Trust* (10), where all the testator's property was held to have passed, the limited description was followed by a general devise of "all I die possessed of."

The doctrine of *falsa demonstratio* has no application here. That applies where something is erroneously described, whereas here there is no error.

(1) 6 H. L. C. 61, 78, 108; 3 Jur. N. S. 825.
(2) Ibid. 616, 630; 3 Jur. N. S. 491.
(3) 7 H. L. C. 68; 5 Jur. N. S. 717.
(4) 3 Atk. 8.
(5) 3 Ves. 191.
(6) 5 East, 51.
(7) 5 B. & Ad. 43.
(8) 16 Q. B. 181.
(9) 8 Ves. 12.
(10) 14 Beav. 608.

The second question is, as to the construction of the word "money." The rule is, that the word is to mean "cash," unless there is indication of a more extended meaning: *Larner* v. *Larner* (1); *Lowe* v. *Thomas* (2); *Langdale* v. *Whitfield* (3); *Montagu* v. *Earl of Sandwich* (4).

Mr. *Jason Smith*, for some of the next of kin, supported the same construction, and cited on the first point: *Bacon's* Maxims of the Law (5); *Timewell* v. *Perkins* (6); *Enohin* v. *Wylie* (7). On the second: *Manning* v. *Purcell* (8); *In re Powell's Trust* (9).

Mr. *Bovill*, for Mrs. *Gibson's* representatives:—

The words are sufficient to carry all the personal estate of the testatrix.

In *Stanley* v. *Stanley* (10), restrictive words were rejected as being a *falsa demonstratio*. The rule is thus laid down by Lord *Westbury*: "The entirety, which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift": *West* v. *Lawday* (11). In *Davis* v. *Shepherd* (12), the *falsa demonstratio* as to the fault was held to be inoperative: *In re Kendall's Trust* (13).

[The VICE-CHANCELLOR referred to *Chalmers* v. *Storil* (14).]

Upon the second point, the construction of the word "money," we say it extends to money on mortgage, and money secured by note of hand: *Jarman* on Wills (15); *Montagu* v. *Earl of Sandwich*; *Rogers* v. *Thomas* (16); *Dowson* v. *Gaskoin* (17).

Mr. *A. Dixon*, for others of the next of kin.

Mr. *E. R. Cook*, for an incumbrancer on the share of Mrs. *Belton*.

Mr. *Pearson*, in reply.

(1) 3 Drew. 704.
(2) 5 D. M. & G. 315; 8 Jur. 563.
(3) 4 K. & J. 426, 434; 4 Jur. N.S. 1706
(4) 33 Beav. 324; 10 Jur. N.S. 61.
(5) Reg. 13.
(6) 2 Atk. 102.
(7) 10 H. L. C. 1; 8 Jur. N.S. 897
(8) 7 D. M. & G. 55.
(9) Joh. 49, 52; 5 Jur. N.S. 331.
(10) 2 J. & H. 491, 502.
(11) 11 H. L. C. 375, 384.
(12) Law Rep. 1 Ch. 410.
(13) 14 Beav. 608.
(14) 2 V. & B. 222.
(15) Vol. i. p. 732, 3rd Ed.
(16) 2 Keen, 8.
(17) 2 Keen, 14.

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Feb. 26. SIR W. PAGE WOOD, V.C.:—

This case involves a simple point under a very short will. The testatrix made her will in this form: [His Honour read the words.] Then two of the legatees, by having unfortunately been attesting witnesses, lose their legacies, and the question is, whether under the words "my personal property consisting of money and clothes," there was a complete disposition of the personal estate.

Mr. *Pearson*, who argued the case very ably, produced a number of authorities, mainly with regard to devises of real estate, to shew that where a general description of property is followed by words which relate to part of the property only, the generality of the description is abridged by the particular description—as distinguished from those cases where the particular description has been held to be immaterial, as amounting to no more than a *falsa demonstratio*.

Now, as regards personal estate, it is to be observed that, at all times, a disposition by will, in general words, of "my personal estate," has been held to pass the property of which a testator was possessed at his death; and of course, since the *Wills Act*, the same rule applies to real estate. Before the Act, however, every devise was regarded as a conveyance, and the presumed intention of the testator was to pass no more of the real estate than he was seised of at the date of the will. The tendency has always been to narrow the construction of a devise of realty.

But as to personal estate, it has always been presumed to have been the intention of the testator to pass whatever he might be possessed of at the date of his death. In the present instance, suppose the testatrix, at her death, had been possessed of nothing but money and clothes. I apprehend that, before the *Wills Act*, the gift in the will would not have been a specific gift of the identical money and clothes at the date of the will, and nothing more; since the passing of the statute (7 Will. 4 & 1 Vict. c. 26), enacting that every will shall be construed to speak from the death of the testator, such a contention, indeed, cannot arise.

There is a case, if I remember right, before Vice-Chancellor Sir *L. Shadwell*, resembling the present (1). The question also is touched upon in Mr. *Roper's* book on legacies, under the chapter entitled "Rights of Specific Legatees" (2). A case of *Bridges*

(1) *Ellis* v. *Selby*, 7 Sim. 352, 364.

(2) Ch. iv. p. 288.

v. *Bridges* (1) is there cited, where a testator bequeathed "the remainder of his estate, viz. his Bank Stock, India Stock and South Sea Annuities," and Lord *King* held that not those particular funds only, but the whole residuary estate, passed; the specification not being added in a restrictive sense, but as an enumeration of the chief particulars of which the estate consisted. Then the reader is referred to *Chalmers* v. *Storil* (2), in which Sir *W. Grant* followed Lord *King's* decision.

In this case there is reason, stronger perhaps than in any that has been cited, to say that the whole estate passed. The clause in question is the whole will; there is no other bequest. I am not infringing the rule which says that you are to look at the words in order to find out the intention of a testator, when I say you are to look also at all the circumstances of the case. When a person is found making her will (although it is true she does not appoint executors), and the only bequest she makes is a gift of her "personal property, consisting of money and clothes," the strong presumption is, that she did not intend only to do that which she might have effectually done by giving her "money and clothes" simply. It appears to me there is no *falsa demonstratio* here, there is simply an imperfect enumeration. The testatrix was a marks-woman, and not very cognisant of the force of particular expressions. She attempted to enumerate the items of which her personal estate consisted, and failed to mention them all; just as in the case of *Bridges* v. *Bridges*, where three kinds of stock only were enumerated, the Court nevertheless held that the whole of the property passed.

It appears to me, therefore, that one-third of the whole of the personal property passes to the legatee who can take; and that the two remaining thirds go to the next of kin. There will be a declaration that, according to the true intent and purpose of the testatrix, the whole of the personal estate passed by her will; but that her two sisters (naming them) are incapable of taking the benefit thereof, they having attested the will.

Solicitors for all parties: Messrs. *C. & H. Bell*, agents for Mr. *Carnochan, Crowle.*

(1) 8 Vin. Abr. "Devise," 295, pl. 13. (2) 2 V. & B. 222.

V.-C. W.
1867
Jan. 31; Feb. 7.

5 Ch. 282,

SCOTT *v.* STANFORD.

Copyright—Injunction—Statistical Returns—Animus Furandi.

A., being clerk and registrar of the *London Coal Market*, was in the habit of publishing, under the authority of the Corporation, at a considerable profit to himself, statistical returns, extracted from the Corporation books of which he had the custody, of all coal imported into *London;* such returns being published annually in sheets, and supplied to subscribers at a cost of £3 3*s.* per annum.

In a work published under the authority of the Lords of the Treasury, giving the mineral statistics of the *United Kingdom* during preceding years, and published at a cost of 2*s.* 6*d.*, the returns compiled and published by *A.* for the last nine years, were introduced into the edition for 1866 (the source from which this information was derived being prominently acknowledged), and formed one-third of the whole of Defendant's work:—

Held, that having regard to the quantity and matter of the information which had been taken and republished without the exercise of any independent thought and labour, and the prejudice to *A.* in having the sale of his work superseded by this republication in a cheap form of his labours, *A.* was entitled to an injunction.

The result, in such cases, is the true test of the act, and full acknowledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator where the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work.

THIS was a motion for the purpose of restraining the Defendant, *Edward Stanford*, of *Charing Cross*, from printing, publishing, and selling, such portions of "*Mineral Statistics of the United Kingdom of Great Britain and Ireland, for* 1865," as set forth the statistics contained in the annual statements published by and on behalf of the Plaintiff, and from otherwise infringing the Plaintiff's copyrights in such annual statements or publications.

The Plaintiff was, in 1847, appointed by the Corporation to the office of clerk and registrar of the *Coal Market* of the City of *London*. His duties, which consisted for the most part in superintending the collection of the dues levied upon coals imported into *London*, were recompensed by an annual salary, and also by the exclusive privilege allowed to him of compiling, printing, and publishing, for his own benefit, under the authority of the Corporation, from the books of the Corporation, of which he had the exclu-

sive custody, certain statistical returns, shewing the quantity of coal, culm, and cinders, imported into *London* from the various collieries.

These returns were printed as annual statements on large sheets of paper, and supplied to subscribers at a price of £3 3*s.* per annum. Since 1863, the words "copyright reserved," have been printed upon all copies of these annual statements, which have been registered at *Stationers' Hall* under the provisions of 5 & 6 Vict. c. 45.

The profits derived from this publication were considerable, and were stated by the Plaintiff to have been taken into consideration by the Corporation in fixing the amount of his salary.

The Defendant, Mr. *Stanford*, of *Charing Cross*, was the publisher of a work compiled by Mr. *Hunt*, keeper of the Government Mining Records, under the authority of the Lords of the Treasury, entitled "*Mineral Statistics of the United Kingdom of Great Britain and Ireland.*" In the edition of this work published last year appeared, for the first time, a chapter of statistics in reference to coal, thus headed:—

"Coal brought by sea, railway, and canal, within the *London* districts since 1854, and entered at the *Coal Market*, compiled from the returns published by authority of the Corporation of *London*, by *James R. Scott*, Esq., clerk and registrar of the *Coal Market*."

The information thus taken from Mr. *Scott's* returns occupied in space about one-third of the book, which contained some 300 octavo pages, and was published for 2*s.* 6*d.* Mr. *Scott*, considering such publication to be an infringement of his copyright, had filed his bill against Mr. *Stanford*, the publisher, and now moved for an injunction: the motion being turned by arrangement into a motion for decree.

Mr. *Hunt*, the compiler of the work published by the Defendant, is keeper of the Mining Records, in the *Museum of Practical Geology* (an officer appointed and paid by Government), and since 1845 one of his principal duties has been to collect and methodize returns of all the mineral productions of the *United Kingdom*, and, as far as possible, the commercial movements of metals and

V.-C. W. 1867 SCOTT v. STANFORD.

coals, for publication under the title "*Mineral Statistics.*" The returns so published were founded on, and embodied, information forwarded to the Mining Record Office by miners, coal proprietors, and metallurgists, on application to them by Mr. *Hunt*, and also such information as could be extracted from documents published by corporate bodies, trade associations, and individuals. Every available source of information was made use of, the greatest care being always taken that the source of information should be specifically acknowledged. From the returns published by the Plaintiff tables were formed, in which the names of the collieries extracted from the Plaintiff's returns were re-arranged in alphabetical order. The items against these collieries were then extracted separately from Plaintiff's tables and arranged in their proper columns, and a summary of the whole was then compiled. This process was stated in the affidavits for the defence to have occupied two clerks about a month, and to have involved, in the case of the railway-borne coal alone, the selection of upwards of 35,000 figures and 4000 words.

The Plaintiff, in reply to this last statement, stated, as a matter in which he was confirmed by his own clerks, that two experienced clerks could in four days have copied and set forth all his statistics in the form appearing in Defendant's book.

Mr. *G. M. Giffard*, Q.C., and Mr. *Andrew Thompson*, for the Plaintiff, contended that there had been a plain infringement of copyright in the unauthorized use by *Hunt* of the Plaintiff's publication, without the exercise of independent time, thought, and labour, upon the subject matter, so as to arrive at the same result from the same common sources of information. The law was clearly stated in *Kelly* v. *Morris* (1), in the following terms:—"In the case of a dictionary, map, guide book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road book, he must count the milestones for himself, . . . and the only use that he can legitimately make of a previous publication is to verify his own calculations and results

(1) Law Rep. 1 Eq. 697.

when obtained." The injury to the Plaintiff, by making his work less saleable, and diminishing his profits, was palpable, and the acknowledgment in the Defendant's book of the Plaintiff's returns as the source from which the information given was taken, did not justify the Defendant in this wholesale appropriation of the Plaintiff's work and labour. They also cited *Campbell* v. *Scott* (1); *D'Almaine* v. *Boosey* (2); *Lewis* v. *Fullarton* (3).

The *Attorney-General* (Sir *John Rolt*), and Mr. *Wickens*, for the Defendant, contended, that even if a large portion of the Plaintiff's work had been taken, and his copyright thereby injured, yet, if the crucial test in all these cases, the *animus furandi*, was absent; if the source from which the information had been taken was honestly acknowledged, and if what had been done was done in good faith, for purely scientific purposes, and without any intention of making a profit, or of superseding the sale of the original work, the Court would not "put manacles on science," or bar the progress of useful information by importing into questions of copyright the rigid restrictions which were established in favour of patentees: *Wilkins* v. *Aikin* (4); *Cary* v. *Kearsley* (5); *Wittingham* v. *Wooler* (6); *Spiers* v. *Brown* (7).

Here there had been no concealment of the source from which the information was taken; that information was remodelled and published in a totally different form by the employment of independent time, labour, and expense, neither directly nor indirectly for profit, and without the smallest intention of superseding the sale of the Plaintiff's work, but simply in order to give publicity in an available form to facts which it was considered desirable for the public to know. The mere fact that the whole of the Plaintiff's publication had been taken in *specie* would not in itself be sufficient to shew that there had been an infringement of his copyright: *Bell* v. *Whitehead* (8); while, on the other hand, the taking of a very small portion only of the original work, might, under the circumstances, amount to piracy: *Campbell* v. *Scott*.

(1) 11 Sim. 31.
(2) 1 Y. & C. Ex. 288.
(3) 2 Beav. 6.
(4) 17 Ves. 422, 425.
(5) 4 Esp. 168.
(6) 2 Sw. 428.
(7) 6 W. R. 352.
(8) 8 L. J. (Ch.) 141; 3 Jur. 63.

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SIR W. PAGE WOOD, V.C.:—

I think there has been an appropriation of the Plaintiff's work to such an extent as to entitle him to an injunction. No doubt these cases sometimes present extremely nice and difficult questions as to what is a fair commentary or a fair use for scientific purposes of the labours of another man. The strongest case in favour of the Defendant is *Cary* v. *Kearsley* (1), where Lord *Ellenborough* said:—"That part of the work of one author is found in another is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science and the benefit of the public; but having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi?* . . . While I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science." I applied that doctrine in the dictionary case, *Spiers* v. *Brown* (2), where a considerable portion of the Plaintiff's work had been taken, but I was of opinion that the Defendant had bestowed such mental labour upon what he had taken, and subjected it to such revision and correction, as to produce an original result.

The general principles guiding the Court in cases of this description could hardly be found better stated than in the following words, used by Mr. Justice *Story* in *Folsom* v. *Marsh* (3), cited in Mr. *Palmer Phillips*' Treatise on Copyright (4):—"In short, we must, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."

In *Bell* v. *Whitehead* (5), Lord *Cottenham* held that the publication of an article from another periodical, for the purpose of criticism, and for the purpose of supporting the observations of the editor upon it, was not such a form of publication as would

(1) 4 Esp. 168.
(2) 6 W. R. 352.
(3) 2 Story, 100, 116.
(4) Page 125.
(5) 8 L. J. (Ch.) 141; 3 Jur. 68.

injure or supersede the sale of the original work. It is urged that this is a case in which no *animus furandi* can be found on the part of Mr. *Hunt*, who has taken these statistics in perfect good faith, and with the fullest acknowledgment in his book of the source from which they are derived. But if, in effect, the great bulk of the Plaintiff's publication—a large and vital portion of his work and labour—has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects. With respect to the Plaintiff's copyright, it has been only faintly impugned. He is the author of the publications in the sense that, being the officer of the Corporation, and bound to keep entries of all coal brought into *London*, and from what collieries, he has, at the expense of much time and labour, compiled and arranged, in very clear and lucid order, the vast mass of information accruing every day as to the importation of coal into the City, and he has the privilege of publishing the information thus collected by his labour from the day-books (where, if left, it would be useless for any purposes of information), and rendering it available for the public. It appears to me quite immaterial whether he has been assisted in the compilation by his own clerks, or by those of the Corporation. A great deal of time and labour must have been spent in this compilation, more, indeed, than in the case of a directory or guide; and there can be no doubt that he is entitled to be protected in the fruits of his labour.

The difference in price is not an unimportant ingredient in the case. The Plaintiff's work is published in yearly sheets, for which his subscribers pay £3 3*s.* a year, while the Defendant's book, containing all the Plaintiff's tables, and a good deal more, and published under the auspices of Her Majesty's Government, who are, no doubt, anxious to supply the public with useful information in a cheap form, but are not the less formidable competitors on that ground, is brought out for 2*s.* 6*d.* only. Can there be any doubt as to the amount of injury to the Plaintiff's work by the publication, at such a price, of this Government book, which, out of 307

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pages, contains no less than 107 taken bodily from the Plaintiff, and constituting, in fact, his whole work, by the mere use of paste and scissors, and without the exercise of any of that labour and toil which the Plaintiff has had to encounter in extracting his materials from the mass of daily returns. No doubt a much cheaper book can be very easily produced in this manner. But it is a manner of dealing with the property of another which this Court cannot permit, and, in my opinion, there has not been a fair *bonâ fide* use of the Plaintiff's work. The Defendant, after collecting the information for himself, might have checked his results by the Plaintiff's tables, but that is a widely different thing from this wholesale extraction of the vital part of his work. No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published.

There must be an injunction, according to the prayer of the bill.

Solicitors: Mr. *C. H. Shepheard;* Messrs *Raven & Bradley.*

V.-C. W. 1867 *Feb.* 27; *Mar.* 6.

UNITED STATES OF AMERICA *v.* WAGNER.

Jurisdiction—Foreign State—Corporate Plaintiff—Pleading—Demurrer.

Demurrer allowed to a bill filed by "The *United States of America*" as Plaintiffs, on the ground that a foreign sovereign state is not entitled to sue in the Courts of equity in this country without putting forward some public officer as representing their interests, upon whom process may be served, and who can be called upon to give discovery upon a cross bill.

Cited by FC 22 W.R. 542.

DEMURRER.

The bill, which commenced as follows:—"Complaining shew unto his Lordship the *United States of America* the above-named Plaintiffs," was filed (as in the suit of *United States* v. *Prioleau* (1)) against the *Liverpool* firm of *Fraser, Trenholm, & Co.*, as agents in this country of the "rebellious political organization

(1) 2 H. & M. 559. 11 Jur. N.S. 792.

under the style of the Government of the *Confederate States of America*," for the purpose of recovering, as state property of the *United States*, certain ships, cotton, and other goods held as public property by the *Confederate States* during the late rebellion, and by them consigned to the Defendants as the agents for the custody and management of their finances and public property in *England*.

To this bill the Defendants put in a general demurrer, raising the preliminary objection that the bill was filed in the name of the *United States of America*, without putting forward the President, or any individual state officer, upon whom process could be served on behalf of the Defendants, or who could be called upon to give discovery to a cross bill filed by the Defendants.

A second ground of demurrer was, that the suit, which was not supplemental to the former suit of *United States* v. *Prioleau*, was a mere splitting of demands, as the subject matter in respect of which relief was now sought was identical, and arose out of the same transactions, with that which was the subject of the former suit, and might have been included in it.

As counsel for the Plaintiffs were not called upon to argue this second point, and it was not noticed in the judgment, the report is confined to the preliminary and main objection to the suit.

Mr. *W. M. James*, Q.C., Mr. *Kay*, Q.C., and Mr. *Charles Hall* (Mr. *J. P. Benjamin* with them), in support of the demurrer :—

The tribunals of this country are open, no doubt, to foreign sovereigns and bodies politic; but they must obey the rules of those tribunals, submit to be bound by their procedure, and sue in a form which makes it possible that complete justice may be done between the parties: *Colombian Government* v. *Rothschild* (1); *Hullett* v. *King of Spain* (2); and the *United States* cannot be exempted from the necessity of conforming to the practice of the Court, which is part of the law of the Court, and binding upon every person applying for relief, whatever be his position, king or peasant, foreigner or native subject. The question being as to the institution of the remedy in this country, in respect of rights which have arisen in a foreign country, the mode of procedure depends on the law of the forum, whose judgment has been

(1) 1 Sim. 94. (2) 2 Bli. (N. S.) 31.

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invoked: *Quæris de his quæ pertinent ad litis ordinationem, et inspicitur locus judicii* (1).

According to that law, every person sued is entitled to have a tangible and substantial assailant—not, as in this case, a mere geographical expression—upon the record, so that he "may know where to resort to compel obedience to any order or process of the Court, and particularly for payment of any costs which may be awarded against the Plaintiffs, or to punish any improper conduct in the course of the suit": *Mitford* on Pleading (2). If no address is given the Defendant may demur, and if a wrong address, or false description be given, the mode of raising the objection is by plea: *Smith* v. *Smith* (3).

The only exceptions serve to prove the rule: corporations to whom a *quasi* individual existence is given in this country are allowed to sue in their corporate name, without putting forward any person on their behalf in this country; but this right of suit is carefully guarded, as the property of the corporation is liable to sequestration, and the Defendant can obtain discovery from its clerk or officer.

[Reference was also made to the cases of suits by a copartnership of bankers, entitled by statute to sue and be sued in the name of their public officer (7 Geo. 4, c. 46, s. 9), and by a voluntary association, where some one member is put forward as representing the rights and interests of the whole body.]

What mutuality or point of contact is there between the Defendants and the Plaintiffs, suing under this vague shadowy description in a bill which is not even authenticated by the signature of the *United States* law officers? Whom are we to serve with a cross bill if it should be necessary to file one? There is nothing to shew that the existing government of the *United States*, being a foreign government acknowledged by the government of this country (*City of Berne* v. *Bank of England* (4),) have submitted themselves to the jurisdiction, so as to enable the Defendants to obtain that discovery from them which is the right of every person sued in equity. The form in which such a suit should be brought

(1) *Bartol.* Comment. in Cod. Lib. i., "*De Summâ Trin.*" *ad L.* "*Cunctos populos.*"

(2) Page 49, 43-4th Ed.

(3) Kay, App. xxii.

(4) 9 Ves. 347.

is pointed out in *Dolder* v. *Lord Huntingfield* (1), where "the bill stated the title of the Plaintiffs as the Llandamman and two stathalters of the *Helvetic Republic,* in whom, by the constitution of the Republic, the executive power is vested." As was observed by Lord *Cranworth* in *King of the Two Sicilies* v. *Wilcox* (2), it is impossible that a whole nation should appear as parties to a suit in this Court, or be represented here otherwise than by their government.

No difficulty or disadvantage will be thrown in the way of the *United States* in compelling them to put forward either the President, who is in the position of a sovereign for the time being, the executive power being vested in him by the constitution, or some individual member of the government from whom an answer can be obtained. The King of *Spain,* in spite of his independent sovereign character, was not absolved from the necessity of answering upon oath, it being held by Lord *Brougham* that "he brings with him no privileges that can displace the practice as applying to other suitors in our Courts" (3); and, as was observed by your Honour in *Prioleau* v. *United States and Andrew Johnson* (4), "I do not in the least hold out the notion that because a state is not represented by an individual, that therefore such state can be in a better position than a monarchy, or can sue in this Court without doing that justice through the means of discovery which this Court insists shall be given by persons in the position of suitors against whom a cross bill may be filed."

Unless, therefore, the Court is prepared to reverse the solemn decision of Sir *John Leach,* which has been recognised and confirmed by the highest tribunal of the land, this demurrer must be allowed.

[They also cited *Wolff* v. *Oxholm* (5).]

Sir *Roundell Palmer,* Q.C., Mr. *G. M. Giffard,* Q.C., Mr. *Druce,* Q.C., and Mr. *Wickens,* in support of the bill:—

The effect of allowing this demurrer will be to exclude the *United States of America,* and all other foreign Governments re-

(1) 11 Ves. 283, 284.
(2) 1 Sim. (N. S.) 301.
(3) 1 Cl. & F. 333, 353.
(4) Law Rep. 2 Eq. 659, 669; 11 Jur. N.S. 724.
(5) 6 M. & S. 92.

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cognised by this country, which are not monarchical, from their right of suit, and to deny them any *locus standi* before the Courts of this country. Any such decision would be opposed to the principles of international justice and amity, and to the established rules of this Court, and would at the same time contravene the highest prerogative of the Crown—that of recognising foreign states. It is no answer to say that the Defendants are entitled, on the principle of mutuality, to have some substantial tangible assailant who can be called upon to give discovery upon a cross bill, as this objection would apply to a bill on behalf of an infant, a married woman, or by a shareholder, in none of which cases can the Plaintiff by any possibility have documents, or give discovery. In any case, such an objection cannot be allowed to stop the progress of the suit, as, after the Defendants have answered the bill, it will be quite competent for the Court, as in *Prioleau* v. *United States and Andrew Johnson* (1), to say that the suit shall not proceed until discovery has been given by the *United States;* and the argument which has been addressed to the Court on behalf of the Defendants involves a confusion between their right to discovery and their mode of obtaining it. If the bill had been filed by some duly authorized agent or minister plenipotentiary of the *United States,* it would have been open to a demurrer on the ground that the *United States* were not properly represented: *Schneider* v. *Lizardi* (2); and equally so, from their want of interest in the subject matter of the suit, if any authorized agent or member of the executive had been joined with the *United States* as co-Plaintiff: *King of Spain* v. *Machado* (3). If, again, it had been filed by "the Government of the *United States,*" or by the President, as chief of the executive, it must have been held to be a description which this Court could not recognise, as Her Majesty knows no such foreign power as "the Government of the *United States,*" the treaties being in all instances with "the *United States of America,*" *simpliciter,* and under that title alone, which is officially recognised by this country, can the *United States* sue in the Courts of this country. The decision of Sir *J. Leach* in *Colombian Government* v. *Rothschild* (4) is explained by the circumstance that "the Colombian Government," which means not the people or the

(1) Law Rep. 2 Eq. 659. (2) 9 Beav. 461. (3) 4 Russ. 225. (4) 1 Sim. 94.

state of *Colombia*, but the persons administering the government of that state, was not the title of any body recognised by treaty with this country, and their counsel, when challenged so to do, were not able to shew who the "Colombian Government" were.

[The VICE-CHANCELLOR referred to the Annual Register for 1825, where (1) the treaty between His Majesty and the State of *Colombia*, signed at *Bogota*, April 18, 1825, is given.]

What is decided by the King of *Spain's* cases is, that a foreign sovereign cannot sue by any of his ministers or state officers; and in the case of a foreign government not a monarchy, they must sue like any other corporation, private or municipal, under that which is their proper recognised designation. That which the Court has to deal with in this suit is that which Her Majesty deals with, the political entity called the *United States of America*, the executive of that country, and the body in whom the right to the state property sought to be recovered in this suit is alone vested.

[They also referred to *Story's* Equity Pleadings, § 55.]

Mr. *W. M. James*, in reply.

March 6. SIR W. PAGE WOOD, V.C.:—

The point which I have to determine in this case is one of some little interest, but very simple in character, and it does not, as it appears to me, involve any of the grave consequences alluded to in the argument, with regard to the good understanding existing between this country and that great and powerful nation which has come here as a suitor of this Court. The question is not whether they can sue: that is a right upon which there can be no doubt, and which has been recognised from the time of the case mentioned in *Rolle's* Abridgment (2), and finally established by the

(1) Page 80*.

(2) The case is referred to in *Rolle's* Abridgement, tit. "*Court de Admiraltie*" (E. 3), as one in which the Court of Admiralty "*ne poient tener plea d'un suit per le Roy de* Spaine *pur succider de* Brasill *bois en* Brasilia *pur ceo que est sur le terre* (Hill, 12 Ja. B. R.) *enter le Roy de* Espaigne *et* Pountes *resolve et prohibition graunt et ceo apres trie al common ley en un trover et conversion.*" And again, in

1 Rol. Ab. 534

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decision of the House of Lords in *The King of Spain's Case;* but how they can best sue, having regard to the consideration due from the Court to the interests of Her Majesty's subjects who may be sued. That is the plain and simple point before me. The point was very clearly put by Mr. *James*, viz., whether, regard being had to the decision in *Colombian Government* v. *Rothschild* (1), and the recognition of that decision by the House of Lords in *King of Spain* v. *Hullett* (2), and in *Hullett* v. *King of Spain* (3), some course should not be taken by which the *United States of America* must sue in some form (to use the expression of Sir *John Leach*) in which the Court may do justice to those who are sued. Those who followed Mr. *James* went further, and said that the "*United States of America*" were to be regarded here, not as the great and powerful sovereign community which they are, but simply as a geographical expression. Of course any such notion would be preposterous, but I was pleased, in the original treaty between the Sovereign of this country and the *United States*, to find an expression which better meets my view than any words which I could use. The great and definitive treaty of peace and friendship, signed at *Paris* on the 3rd of September, 1783, between "His Britannic Majesty and the *United States of America*," commences as follows:—

"In the name of the Most Holy and Undivided Trinity. It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince *George* III., by the grace of God King of *Great Britain, France*, and *Ireland*, Defender of the Faith, &c., and of the *United States of America*, to forget all past misunderstandings and differences that have unhappily interrupted the

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Rolle's Reports, i. 133, where, after stating the granting of the prohibition (P. 13 Ja.) "*le Court fuit de mesme l'opinion, mes fuit tenus per* Coke *et* Dod. *que l'embassador puissoit aver action pur ceo en cest Court (et al auter jour le counsel del' embassador vient en Court et dit que il voilt surcesser son suite en l'Admirall Court et port action icy, per que fuit order* per curiam *per consent des parties accordant, et issint nul prohibition grant et puis le Roy de* Spaine *port action vers luy en B. R.*" See the observations and queries of the Lord Chancellor upon this case in the course of the argument in *Hullett* v. *The King of Spain* (2 Bli. (N. S.) pp. 53, 54, 55).

(1) 1 Sim. 94.

(2) 7 Bli. (N. S.) 359.

(3) 2 Bli. (N. S.) 31.

good correspondence and friendship which they mutually wish to restore" (1).

The question then is, whether, being a body politic (I cannot call them a corporation, for although in some respects the analogy may apply, in others it fails entirely) the *United States* can sue simply in that name without naming any person to act on their behalf, or who can comply with the ordinary requisitions of Courts of justice in the progress of the suit; thus obtaining an advantage which certainly no other suitor could have in this Court. I say no other suitor could have that advantage, because, as regards corporations, the rule has been long established, not merely as a rule of practice, which might vary according to the exigencies of the period under the different circumstances from time to time occurring, but upon great principles of moral justice, as expressed by Lord *Talbot* in *Wych* v. *Meal* (2), applicable to all time, and irrespective of any distinctive course of procedure which may prevail in one country or another. *Wych* v. *Meal* was a suit against the *East India Company* and one of the officers of the company, who was made a Defendant in order to obtain a discovery of certain entries and orders in the books of the company; and Lord Chancellor *Talbot* overruled a demurrer, observing that, although the answer of the officer could not be read against the company, "yet it may be of use to direct the Plaintiff how to draw and pen his interrogatories towards obtaining a better discovery, and no instance is produced where such demurrer has been allowed; and it may be very mischievous and injurious to the subject by allowing thereof to deprive them of that discovery to which, in common justice, they are entitled; and, on the other hand, no manner of inconvenience can ensue from obliging such officers of a company to answer."

I had occasion to consider the very point in the analogous case of *Prioleau* v. *United States and Johnson* (3), where it was sought, in a cross bill, upon the principle of *Wych* v. *Meal*, to introduce the President of the *United States* as an officer of the body politic, for the purpose of obtaining discovery. I there held that the Plaintiff (in the cross suit) was not entitled to select any member he pleased of the body politic and make him a party to the bill,

(1) Annual Register for 1783, p. 339. (2) 3 P. Wms. 311.
(3) Law Rep. 2 Eq. 659, 12 Jur. N.S. 724

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for this simple reason, that there was no *constat* before the Court that that great body politic had such an authority over the particular individual selected as to compel him to put in an answer.

In the case of a mere foreign corporation for trading purposes, the Court will assume, as in the case of the *Collins Company* v. *Brown* (1), that the secretary or other officers are under its control, and therefore it would be a matter of course to make any one of those officers a party to the cross bill in order that discovery may be obtained.

But that cannot be done with reference to a body politic, and therefore in the case of the cross bill in which the President of the *United States* was introduced as a Defendant, I thought that I was not authorized to stay proceedings in the original suit until the President should have put in his answer. Nothing that I said upon that occasion, however, was intended to lead to the conclusion that the parties were not entitled to discovery. On the contrary, I said it appeared to me, so far as I could settle a question not actually before me for decision, that there would be no failure of justice in refusing the motion so far as the President was concerned, because the object could be obtained by amending the bill, and inquiring who were the proper persons to give discovery. I took the opportunity of saying, having regard to the case of *Colombian Government* v. *Rothschild* (2), that the Defendant to the original suit (the Plaintiff in the cross bill) might have missed his more adequate remedy by not interposing by demurrer at an earlier stage.

The *United States* have now filed a bill, and the demurrer has been put in, and the first case that I have to consider is the leading authority of *Colombian Government* v. *Rothschild*. In that case the bill was filed on behalf of the government of the State of *Colombia*, and the observations of Sir *John Leach* turn entirely upon the broad question how far a foreign government suing in this country can obtain relief without bringing forward some individual who may be dealt with in case the Defendant should be minded to file a cross bill, or have recourse to the other remedies to which he would be entitled as against the Plaintiff in the case of an ordinary individual. Undoubtedly there were other circum-

(1) 3 K. & J. 423; 3 Jur. N.S. 929. (2) 1 Sim. 94.

stances in that case, but Sir *John Leach* carefully avoids paying any attention to them, though I apprehend those circumstances, if he had considered them, would not have made any difference.

At the time of the contract, which was the subject matter of that suit, being made, no such body as the State of *Colombia* was in existence, recognised by the government of this country, though the states were recognised before the filing of the bill. This appears from the argument, and also from the treaty which is given in the Annual Register for 1825 (1).

It appeared, moreover, that the state so recognised had adopted the contract which had been entered into by the former unrecognised state. There was no question, therefore, upon those points, and the only other point upon which it could have been sought to sustain the demurrer was upon misjoinder, in adding the minister as co-Plaintiff. Upon that point, although there is nothing said, the case might possibly be upheld, and what follows be reduced to a *dictum*, were it not for the approbation given to this authority by the subsequent cases in the House of Lords. Sir *John Leach*, who had a happy mode of expressing himself, seems in this one sentence to have put the whole case:—

"A foreign state is as well entitled as any individual to the aid of this Court in the assertion of its rights, but it must sue in a form which makes it possible for this Court to do justice to the Defendants. It must sue in the name of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the Defendants. This general description of Colombian government precludes the Defendants from their just rights, and no instance can be cited in which this Court has entertained the suit of a foreign state by such a description."

I cannot accede to the argument that was pressed on me, that the decision turned upon the misnomer in suing in the name of the government of the State of *Colombia* instead of in the name of the State of *Colombia*. There is nothing to lead me for one moment to suppose that that was the intent or scope of the decision, or that it had any bearing on the question, or that the Plaintiffs could

(1) Page 80*.

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not have at once amended by striking out the word "government" and putting in the word "state." The decision was, that when foreign states sue they must assert their rights in a form that renders it possible for the Court to do justice to the Defendants. That principle was recognised in the House of Lords in the cases in which the King of *Spain* was concerned. The first (1) was an appeal from a decision of the Court below, holding that a foreign sovereign may sue in equity, and in the second (2) his Catholic Majesty was ordered to answer the cross bill personally, and upon oath. The decision of Sir *John Leach* was referred to and spoken of with approbation by their Lordships in each case, and there is no doubt that it is the practice, and if the practice, the law of the Court.

The remaining point was this, it was said they should sue by their executive, and that gives rise to the question in what form the suit should be. It appears to me to be established by the authorities that the suit must be in such a form that justice shall be done by having some one before the Court to answer a cross bill. The exact form is another question.

It was said, and with some degree of reason, that we could only look to the treaties by which Her Majesty deals with foreign powers to see what their style and title is, and who is the person with whom we are dealing. In looking at several treaties I find there is a great difference in the style in which they are concluded with such bodies politic.

In the original treaty of 1783, and in all subsequent treaties with the *United States of America* that I have been able to find, the treaty has always been with "The *United States of America*," no one else—no person being named. The only single instance in which the President appears to have been mentioned is in the treaty of 1846 for the settlement of the *Oregon* boundary (Annual Register for 1846 (3)). The treaty is still with "The *United States of America*," but the President's name occurs in this shape:—"Her Majesty the Queen of the United Kingdom of *Great Britain* and *Ireland*, and the *United States of America*, deeming it desirable for the future welfare of both countries that" the

(1) 2 Bli. (N. S.) 31. (2) 7 Bli. (N. S.) 359.

(3) Page 453.

boundaries should be settled, the Queen has appointed certain ministers, "and the President of the *United States of America*" has appointed others with full power to treat. The treaty, however, is not with the President, but with the *United States*. On the other hand, in dealing with the French Republic, when the present Emperor was President of it, the International Copyright Treaty of November, 1851, commences thus:—"Her Britannic Majesty and the President of the French Republic have deemed it expedient to conclude a special convention." In that case I apprehend it is clear that the President of the French Republic was the person authorized to deal in all transactions with this country on behalf of himself and the whole body in respect of whose interests he treats. [His Honour also referred to the treaty with the States General of *Holland* in the Annual Register for 1783 (1).] In that state of things it is enough for me to say, in order to allow the demurrer, that some one must be put forward. It by no means follows that the President of the *United States*, he being the person dealt with by this country, or recognised by this country, is the proper person. I may have judicial notice, to a certain extent undoubtedly, of his high office from the treaties and circumstances I have mentioned, and of his being the person who appointed others to ratify the Boundary Treaty. Of course we all have other notice of his forming a portion of the executive, and I was invited to refer to the constitution of the *United States* (which I do not know that I can take judicial notice of) to see that he was authorized to act for them. I am not holding, nor am I prepared to hold, that there can be a suit by him as representing the *United States*. He may not be the proper person to institute a suit on behalf of that country, and I should feel the same difficulty as I felt in the former case where he was made a Defendant to the suit.

But I am clear that the *United States of America*, if they wish to sue in the Courts of this country, must sue subject to all the consequences that any other sovereign state is subject to, and if justice is to be done to them it must be done to them, as I am sure would be their wish, in the same manner as it is done to other persons, and they must put forward some person who will be in a position to answer a cross bill, or give discovery by that or other

(1) Page 319.

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means; and by putting him forward the exigencies of the case contemplated in *Colombian Government* v. *Rothschild* would be answered. We have no precise decision as to the form in which such bodies must sue, though we have a precise decision as to the form in which they cannot sue. Even if I thought that decision not founded on a just appreciation of the principles or practice of the Court, it would not be in my power to depart from it, regard being had to the way in which it has been approved. But I cannot say I entertain a doubt upon the justice of that decision. It has been settled in two cases at common law: *Emperor of Brazil* v. *Robinson* (1); *Otho, King of Greece* v. *Wright* (2), that a sovereign prince must give security for costs like other suitors; and from the time of the King of *Spain's* case there can be no doubt that justice must be done to foreign sovereigns in the same way as justice is administered to other suitors. A corporation is only entitled to sue without producing its officer, because the Defendant can make an officer a party to a cross bill. That cannot be done in the case of a body politic of this description, and all I determine is that when the *United States* sue as Plaintiffs they must let the Defendant know from whom he can obtain discovery, and who is the proper officer to put forward if that be his mind or desire. That must be expressed on the bill, and I think there will be no difficulty in expressing it. On these grounds I allow the demurrer, with liberty of course to amend.

Leave to amend was at first declined by Sir *R. Palmer*, but the order ultimately made was to allow the demurrer, with leave to amend on payment of costs.

Solicitors: Messrs. *Sharpe, Parker, & Co.*, agents for Messrs. *Harvey, Jevons, & Ryley, Liverpool;* Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Hull, Stone, & Fletcher, Liverpool.*

(1) 5 Dowl. P. C. 522. (2) 6 Dowl. P. C. 12.

LORD *v.* COLVIN.

V.-C. M.
1867
Jan. 26;
Feb. 16.

Administration Duty—55 Geo. 3, c. 184—Contingent Interests.

Administration duty must be paid on the whole personal estate belonging to an intestate, including contingent interests; and where such duty was not paid on a contingent interest, which afterwards fell into possession:—

Held, that administration duty must be paid on the present value of the absolute interest, and not on the value of the contingent interest at the date of administration only; although if duty had then been paid on the value of the contingency, the Crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession.

THE object of this Petition was to ascertain what amount of administration duty was payable in respect of certain contingent interests which had fallen into possession of the Petitioners as administrators since the grant of administration.

Dr. *Peter Cochrane*, by his will, dated the 13th of October, 1829, after giving certain annuities, and directing that his housekeeper (*Rahum Bebee*) should have the use and occupation of his house in *Calcutta* during her life, directed and ordained the remainder of his personal estate, to be divided equally between his sons, *Peter Cochrane*, the younger, and *John Cochrane*, and their lawful children respectively, payable on their respectively arriving at the age of twenty-five years complete, and that the proceeds of his aforesaid house in *Calcutta*, and the capital sums corresponding to the aforesaid several annuities, should in like manner, as the same should be respectively freed by the death of the said *Rahum Bebee*, and by the expiration of the annuities, be also divided equally betwixt his said two sons and their lawful children respectively, on or after themselves respectively arriving at the age of twenty-five years complete; and in case of either his said two sons predeceasing him, or dying before their arrival at the age of twenty-five years complete, without leaving lawful issue of their bodies, the said testator directed the remainder of his said personal estate to be paid and delivered over to the survivor of them, and his lawful children, as in manner aforesaid; and in the event of both his said lawful sons predeceasing him, or dying

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before they arrived at the age of twenty-five years complete, without leaving lawful issue of their bodies, the said testator directed the remainder of his said personal estate to be paid and delivered over to the eldest lawful son, or other children or child, or other issue of Mrs. *Susan Cochrane*, or *Moorhouse*, wife of Lieutenant *Moorhouse*, a natural daughter of the testator.

The testator died in 1831; his widow died in 1834; and both his sons died under the age of twenty-five years, intestate and without issue, in 1835. Mrs. *Moorhouse* died, without issue, in September, 1864, and thereupon, in consequence of the failure of all the gifts in the will, the personal estate devolved on the next of kin of the testator *ab intestato*. According to the law of *Scotland*, where the testator had his domicil his next of kin were to be ascertained at the time of his death, and such next of kin were his two sons, now represented by the Petitioners.

In taking out letters of administration to the estates of the two sons, the value of the contingent interests in the personal estate of the testator was not separately stated or specially taken into consideration, and the question was, what amount of duty was payable on those interests now that the property had fallen into possession.

Mr. *Anderson*, Q.C., Mr. *E. F. Smith*, Q.C., and Mr. *Davy*, for the Petitioners:—

The value upon which probate or administration duty is payable is to be estimated at the period of taking out probate or administration; and any subsequent increase in such value is quite immaterial, and does not entitle the Crown to any greater duty. At the date of taking out administration the interests in question were subject to contingencies which rendered them of comparatively little value. At that time duty was paid on the estates, and such duty must be taken to have been in respect of the whole estates, including their contingent interests, whatever might be their proper value, if they had any. Letters of administration having been granted, the Court will assume that duty was paid on the estate generally. Too little may, indeed, have been paid, because the contingent interest may have been unduly depreciated, and not properly valued. But assuming this to be so, the result would only be to ascertain what, having regard to the contingencies, was the "true value"

of the interest at the time when the probate was granted. The 41st section of the 55 Geo. 3, c. 184, which governs this question, is explicit, and free from all ambiguity. There may, indeed, be a penalty for not having ascertained the true value at the time when the probate was originally granted; or, when the true value is ascertained, as at the date of the probate, it may be that interest is chargeable from that date to the time of payment. But neither of these considerations can affect the principle on which the duty ought to be calculated. Probate or administration is only once granted of the whole estate, and if the claim of the Crown were to be sustained, the consequence would be not the granting of another probate or administration, but re-swearing the value of the estate under the original probate: *Gwynne* on Probate and Legacy Duties (1); *In re Knowles* (2).

The *Attorney-General* (Sir *John Rolt*), and Mr. *Pemberton*, for the Crown:—

The contingent interest was capable of valuation at the time of the grant of probate. It must be of some value, though it may be that there are no tables on which to found the valuation: the contingent interest was just as much liable to probate or administration duty as any other portion of the estate.

When a person comes to get money out of Court, he must shew his representative character by means of his probate or letters of administration, and must shew that the specific sum is included in them: *Attorney-General* v. *Brunning* (3); and the duty must be calculated, not only on the amount at the time of the death, but also on all its accretions: *Attorney-General* v. *Partington* (4).

The Court always looks to see that the proper duty has been paid; and in *Christian* v. *Devereux* (5) refused to grant a stop order, sufficient duty not having been paid. In *Jones* v. *Howells* (6) it was held that a suit could not be sustained for a larger amount than was covered by probate, and the same as to an action at law: *Carr* v. *Roberts* (7). Although the contingency may not admit of

(1) Page 22.
(2) 1 D. M. & G. 60.
(3) 8 H. L. C. 243; 6 Jur. N.S. 1033.
(4) 10 Jur. (N.S.) 825.
(5) 12 Sim. 264.
(6) 2 Hare, 342.
(7) 2 B. & Ad. 905.

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estimation by actuaries, the executor or administrator is bound to put a fair value on it: *Talbot* v. *Staniforth* (1): which was not done in the present case, as was obvious from the small sum at which the estates of the two sons respectively were valued at the time the probates were granted. [They also referred to *Townley* v. *Bedwell* (2).]

Mr. *Baily*, Q.C., and Mr. *Cotton*, Q.C., for the executors of Dr. *Cochrane*, the testator.

Mr. *Anderson*, in reply:—

It was not a legitimate inference, from the smallness of the amount at which the value of the estates of the two sons was sworn that this contingent interest was not included. In the absence of any evidence to the contrary, it must be presumed that the amount represented, or embraced, all interests, whether pure or contingent, belonging to the estate. Having regard to the contingencies which existed at the date of the probate, the administrator taking out administration would be fully justified if he put on the value a small or even a nominal sum.

[He also referred to *Matson* v. *Swift* (3) and *Williams* on Executors (4).]

Feb. 16. SIR R. MALINS, V.C.:—

The question raised on this Petition depends upon the construction of the statute, 55 Geo. 3, c. 184, by which the probate and administration duties are imposed.

The 38th section of that Act prescribes the mode of ascertaining the value of the estate upon which the duty has to be paid; the 40th section provides for the return of duty when too much has been paid; and the 41st section provides for the payment of additional duty when too little has been paid, and this is the section upon which the present question depends.

The principle upon which the amount of probate and administration duty is to be determined are, I think, correctly stated by

(1) 1 J. & H. 484. (3) 8 Beav. 368.
(2) 14 Ves. 591. (4) 6th Ed. (1867) pp. 588, *et seq.*

Mr. *Gwynne*, who, in his treatise on the Law relating to the duties on Probate and Letters of Administration, says:—

"It is questionable whether an executor or administrator, at the time of taking out probate or letters of administration, is bound to include property in which the deceased had only a reversionary interest; and, if included, whether the whole value should be paid on it, without any deduction in respect of the intermediate interest, or such deduction should be made and the value of the reversion only paid for. The question has never been submitted to judicial consideration, but the construction which is put by the commissioners of stamps on the 55 Geo. 3, c. 184, is that a reversionary interest, as well as every other part of a deceased's personal estate, should be included in the probate or administration, on its being first obtained, and that sufficient duty is paid if the reversion be fairly valued; and for the purpose of ascertaining the value for probate and administration duty, the commissioners will recognise the use of the tables in the 36 Geo. 3, c. 52, for valuing annuities." And at page 23 Mr. *Gwynne* says:—

"But if the value of such reversion be not included at the time of taking out the probate or administration, duty will be payable on the whole sum when the reversion shall become a present interest."

It is admitted that probate duty was not paid upon this property when the letters of administration were taken out; because it was then wholly uncertain whether there would be an intestacy, and also because the contingency upon which it depended, namely, the death of Mrs. *Moorhouse* without issue, was one incapable of valuation; and the question is, what duty is now payable?

It is clearly settled that probate or administration duty attaches upon all the estate of the testator or intestate which is of a personal nature at the time of his death, or which, by subsequent events, becomes so.

In the case of *Attorney-General* v. *Brunning* (1) it was decided that it attached upon the value of real estate, which the testator

(1) 8 H. L. C. 243; 6 Jur. N.S. 1083.

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had, by a binding and valid contract, agreed to sell in his lifetime, though it remained real estate in his hands at the time of his death; and upon the principle decided by that case, there can be no doubt that if a testator, as in *Lawes* v. *Bennett* (1) and *Townley* v. *Bedwell* (2), granted a lease of his real estate, and gave the lessee the option of becoming the purchaser, and that option was not exercised for some years after his death, so that the property at his death devolved upon his heir as real estate; yet on the option being afterwards exercised, it would operate as a conversion of the property as from the date of the lease, and probate duty would become payable upon the amount of the purchase-money.

The true rule is, in fact, that stated by Lord *Campbell* in his judgment in the case of *Attorney-General* v. *Brunning* (3)—"that all moneys which the executor recovers by virtue of the probate must be considered part of the estate and effects of the testator, and subject to probate duty, whether legal or equitable assets, although equitable assets are differently dealt with by a Court of equity, in payment of debts and incumbrances."

Accordingly, in *Attorney-General* v. *Partington* (4), it was decided by the Court of Common Pleas that probate or administration duties must be calculated, not only on the principal money which constituted the property at the time of the death, but also on the accumulations of interest between the death and the grant of probate or letters of administration; and in *Christian* v. *Devereux* (5) Sir *L. Shadwell* refused to grant a stop order where the amount for which it was required was not covered by the probate duty which had been paid; and in *Jones* v. *Howells* (6) Sir *James Wigram* held that a suit could not be sustained for a larger amount than was covered by the probate.

The same principle was decided to be applicable to an action at law by the Court of Queen's Bench in *Carr* v. *Roberts* (7).

These authorities distinctly establish that probate duty must be paid on all the personal estate; and though in this case the pay-

(1) 1 Cox, 167.
(2) 14 Ves. 591.
(3) 8 H. L. C. 256, 6 Jur. N.S. 1084
(4) 10 Jur. (N.S.) 825.
(5) 12 Sim. 264.
(6) 2 Hare, 342.
(7) 2 B. & Ad. 905.

ment of the amount of probate duty, which is now demanded by the Crown, might have been avoided if the duty had been paid on the value of the contingent interest when the administration was taken out, as it was not then paid, the only criterion of the amount to be paid is the value of the property to be recovered or received by the administrators under the letters of administration; and that conclusion produces no hardship or injustice, for the amount now claimed must have been paid if the property had been in possession when the administration was taken out. What hardship or injustice is there, then, in its being paid now that it has fallen into possession?

The result being that all personal estate must bear its proper proportion of the fiscal burden imposed by the Act, this property would escape from its proper contribution if the contention of the Petitioner were to prevail.

I am, therefore, of opinion that the probate or administration duty must be paid upon the amount to which the several intestates have ultimately become entitled.

The decision in *Matson* v. *Swift* (1), which was relied upon by Mr. *Anderson* in his reply, turned upon the fact of there not having been any conversion of the real estate of the testator in his lifetime, and has, therefore, no application to this case.

Solicitors for the Petitioners: Messrs. *Willoughby & Cox.*

Solicitors for the Respondents: Mr. *W. H. Melvill;* Messrs. *Freshfields & Newman.*

(1) 8 Beav. 368.

V.-C. M.

1867

Feb. 9.

TURNER *v.* MARRIOTT.

Specific Performance—Vendor and Purchaser—Decree, Form of, where no Title found—Lien on Estate for Deposit and Costs.

Where, in a suit by vendor for specific performance, it was certified that a good title was not deduced, the Court ordered a return to the Defendant of his deposit-money, with interest at 4 per cent., and declared the Defendant entitled to a lien on the estate for the same, and also for his costs, with liberty to apply; and, subject thereto, dismissed the bill.

THIS suit was instituted by a vendor against a purchaser for specific performance, and an inquiry had been directed as to title, which resulted in a certificate that a good title had not been deduced. Under these circumstances, the Plaintiff intimated to the Defendant that he did not intend to proceed with the suit, and the Defendant now brought on the cause, upon further consideration, on affidavit of service on the Plaintiff, who did not appear. The Defendant had paid a deposit on his purchase-money.

Mr. *Fry*, for the Defendant:—

Where, in a suit for specific performance, a good title is not deduced, and a deposit has been paid, the Court will dismiss the bill with costs, and order a return of the deposit-money, with interest at 4 per cent., and will grant a lien on the estate for such deposit and interest: *Lord Anson* v. *Hodges* (1); *Wythes* v. *Lee* (2). Such lien will also extend to the costs of the suit: *Middleton* v. *Magnay* (3).

Sir R. Malins, V.C.:—

The Plaintiff in this case must be ordered to repay to the Defendant the deposit paid by him on his purchase-money, together with interest at 4 per cent., and it must be declared that the Defendant is entitled to a lien on the Plaintiff's interest in the estate contracted to be sold for such deposit and interest; and also, following the decision of Vice-Chancellor *Wood* in *Middleton*

(1) 5 Sim. 227. (2) 3 Drew. 396; 2 H. & M. 7 (3) 2 H. & M. 233.

v. *Magnay*, for the costs of the suit; with liberty to the Defendant to apply at Chambers if necessary to give effect to the lien; and thereupon the bill must be dismissed with costs.

MINUTES.—Order the Defendant's costs of this suit to be taxed and paid by the Plaintiff, *George Henry Turner*, to the Defendant, *Charles Bertie Marriott*; and that the Plaintiff, *George Henry Turner*, do, within fourteen days after service of this order, such service to be verified by affidavit, pay to the Defendant, *Charles Bertie Marriott*, the deposit of £450, paid by the Defendant into the hands of the Plaintiff's solicitor as a deposit, and in part payment of the purchase-money, together with interest thereon, at the rate of 4 per cent. per annum, from the 20th day of June, 1865, until payment, the amount to be verified by affidavit. Declare that the Defendant is entitled to a lien on such estate or interest, as the Plaintiff has in the hereditaments comprised in the said agreement, for the amount of the said costs, and the said sum of £450, and interest thereon, as aforesaid; and it is ordered that the Defendant be at liberty to apply in Chambers to give effect to the said declaration; and it is ordered that thereupon the Plaintiff's bill do stand dismissed out of this Court.

Solicitors for the Defendant: Messrs. *Evans & Foster.*

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Feb. 23, 25.

LEHMANN *v.* McARTHUR.

Lease—Covenant not to assign without License—License not to be withheld "unreasonably or vexatiously"—What is an unreasonable Refusal—Specific Performance—Damages.

Where a lease contained a covenant by the lessee not to assign without license, and the lessor covenanted not to withhold his license to assign unreasonably or vexatiously:—

Held, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing the license being, avowedly, his wish to get a surrender of the lease, for the purpose of rebuilding.

The Court decreed the lessor to concur in the assignment, and directed an inquiry to assess the damages to be awarded to the lessee for the refusal of the license to assign.

Semble, a lease being a grant of the demised property for the whole term, the lessor is not entitled to make an indirect use of any stipulation in the lease for the purpose of forcing a surrender of the term.

Rep. 13 L. T. 206, 496

BY an indenture dated in September, 1862, the Defendant *Shakerley* demised unto the Defendant *McArthur*, his executors, administrators, and assigns, certain premises, situate in the city of *London*, for a term of twenty-one years, determinable after seven or fourteen years, at the yearly rent of £230, subject to the performance, on the lessee's part, of certain covenants, and, amongst others, that he would not assign the premises to any person without the previous license and consent in writing of the lessor, but which license and consent, it was expressly agreed by and between the parties, "should not be withheld unreasonably or vexatiously."

On the 3rd of August, 1864, an agreement was signed by the Plaintiff and *McArthur* for the sale of the lease to the Plaintiff for 1000 guineas, "subject to the landlord's (*Shakerley's*) approval, and also to the several existing under-tenancies," and a deposit of £150 was paid. The agreement contained a clause giving *McArthur* an option to rescind within a specified time (which option was afterwards declined in the same month of August) and providing, in case of the contract being so rescinded, for the return of the

deposit, less £4 per week as rent of part of the premises which the Plaintiff was to occupy in the meantime.

On the 15th of August, *McArthur* let the Plaintiff into possession of part of the premises. The title was afterwards approved, and the assignment was engrossed on the 5th of September, 1864, and sent to the solicitors of *McArthur*, with a request for an appointment to complete. On the faith of the agreement the Plaintiff entered into a treaty with two of the under-tenants, to prolong their tenancies at considerably increased rents; but this treaty went off in consequence of the non-completion of the agreement between the Plaintiff and the Defendant *McArthur*, and the Plaintiff sustained considerable damage thereby. *McArthur* endeavoured to obtain a license from *Shakerley*, but he refused, offering to take back the premises at the price agreed to be paid by the Plaintiff, and to pay all expenses; and on the 18th of November, 1864, *McArthur's* solicitors wrote to the Plaintiff's solicitor, stating their regret that the lessor positively objected to grant a license, and that they must, therefore, consider the treaty for sale at an end.

On the 16th of December, 1864, the Defendant *McArthur* signed an agreement to assign or surrender the lease to *Shakerley*. Considerable correspondence passed between the solicitors of all the parties, and, in the course of it, the Plaintiff's solicitor, having pressed for the granting of a license, was informed by the solicitors of the Defendant *McArthur* that the lease was to be transferred to the Defendant *Shakerley*.

After the refusal to grant a license, some negotiations took place between the Plaintiff and *Shakerley's* solicitors respectively, with the view of obtaining a lease of the premises to the Plaintiff from *Shakerley*, but these negotiations failed, as *Shakerley* asked terms to which the Plaintiff would not accede.

On the 9th of February, 1865, the Plaintiff had an interview with *McArthur*, and requested him again to urge *Shakerley* to grant a license, but he told the Plaintiff that he had considered the contract at an end, and that he had agreed to assign the premises to *Shakerley*. The Defendant *McArthur* stated in his answer that it was not until February, 1865, that either he or his solicitors received any intimation from the Plaintiff, or his

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solicitor, that he should not consider the letter of the 18th of November, 1864, as final, in reference to the conditional contract before them.

On the 3rd of April, 1865, the Defendant *McArthur* executed an assignment of the lease to the Defendant *Broughton*, in trust for the Defendant *Shakerley*, for the sum of £1170 6*s*., being 1000 guineas, and £120 6*s*. for fixtures and expenses.

The Plaintiff continued in the possession of some portion of the premises, and, in January, 1866, actions were brought against the Plaintiff: one by the Defendant *McArthur*, for the recovery of rent at the rate of £4 per week, from December, 1864, to April, 1865; and the other by the Defendant *Broughton*, for the recovery of rent, at the same rate, from April, 1865, to January, 1866, and he also, on the 29th of January, 1866, received from the Defendant *Broughton* notice to quit the premises at the end of one week.

The bill was filed on the 12th of February, 1866, praying for the specific performance of the agreement by the Defendant *McArthur*, for the residue of the term; that the Defendants *Shakerley* and *Broughton* might be decreed to concur in the assignment; that damages which the Plaintiff had sustained by reason of the non-performance of the agreement might be assessed by the Court; and that the Defendants, or one of them, might be decreed to pay the amount to the Plaintiff; for accounts, for injunctions to restrain the actions, and for costs.

The Defendant *McArthur* admitted that the Plaintiff was solvent and respectable, and he stated that no objection to him as tenant of the premises existed, and the Defendant *Shakerley*, by his answer, also stated that he had no reason to doubt the solvency and respectability of the Plaintiff; and admitted that no objection to him as tenant existed, but said that he was entitled to the reversion of the premises, and that it was a matter of importance to him to get in the leasehold interest outstanding therein, with a view to the rebuilding of the premises.

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the Plaintiff, submitted that *McArthur* ought to have taken the requisite steps to procure the license, and that *Shakerley's* withholding of his license was unreasonable and vexatious. The lease was determinable upon

notice, and as there had been great delay in the performance of the agreement to assign, and as the treaty with the under-tenants had been put an end to through the conduct of *McArthur* and *Shakerley*, the Plaintiff was entitled to damages for the loss which had been occasioned to him.

Mr. *Osborne*, Q.C., and Mr. *Bunting*, for the Defendant *McArthur*:—

If a person has a contract to be enforced by this Court, he must file a bill for that purpose within a reasonable time: *Watson* v. *Reid* (1).

It was stated by *McArthur*, in November, 1864, that as *Shakerley* would not grant a license, he considered the contract to be at an end, and this bill was not filed till February, 1866. In *Walker* v. *Jeffreys* (2) delay in taking proceedings to enforce the performance of a covenant was held to be a good defence in equity; and so in *Heaphy* v. *Hill* (3), a bill by a lessee for specific performance of an agreement was dismissed, because it was not filed until long after the Defendant had given notice of his intention not to perform it.

In *Southcomb* v. *Bishop of Exeter* (4), the delay in filing a bill for specific performance of a contract was held to be fatal to the Plaintiff's case; also in the case of *Stuart* v. *London and North Western Railway Company* (5), the delay of the Plaintiff was a sufficient answer to the suit, and so in the case of *Eads* v. *Williams* (6). On these authorities, the Plaintiff came too late for specific performance. But the lessor had a right to withhold his license. His contract was with his lessee and not with the Plaintiff, and it was not unreasonable or vexatious conduct on his part to object to *McArthur's* assigning, provided he was held harmless. *McArthur's* conditional contract did not limit his lessor's right to approve of it. The Plaintiff knew nothing of the special terms of the lease, and he could not claim anything till the lessor had actually approved of him.

McArthur exerted himself to obtain a license, and it was not till

(1) 1 Russ. & My. 236.
(2) 1 Hare, 341.
(3) 2 S. & S. 29.
(4) 6 Hare, 213.
(5) 1 D. M. & G. 721.
(6) 4 Ibid. 674.

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after the total failure of his efforts that he contracted with his lessor. When he first gave notice to the Plaintiff that he considered the contract at an end, no objection was made, nor did *McArthur* hear anything from the Plaintiff for several months, and therefore the Plaintiff's own laches precluded him from obtaining relief in this suit: *Nunn* v. *Fabian* (1). The possession by the Plaintiff ought not to entitle him to prevent the Defendants from objecting to the time he had taken before instituting this suit.

Mr. *Rowcliffe* (Mr. *Bacon*, Q.C., with him), for the Defendants *Shakerley* and *Broughton*, contended that the contract was made subject to the approval of *Shakerley*, without reference to any lease, or to *Shakerley's* power to withhold his license, and that *Shakerley* had not withheld his license unreasonably or vexatiously, he having a substantial ground for doing so—the rebuilding of the premises. *Shakerley* had a power to assent or dissent, and he exercised his veto reasonably. Then having regard to the Plaintiff's own laches, he was not in a position to come to this Court for relief. In *Clegg* v. *Edmondson* (2), it was decided that if a man wished to keep his rights alive, he must do more than merely protest—continual assertions of a claim, unattended by any act to give effect to it, would not keep alive a right.

SIR JOHN STUART, V.C.:—

I think that the Plaintiff is entitled to relief. The lease clearly provides that, under reasonable circumstances, the lessee shall have a right to assign. There is mutuality involved in the covenant. On the part of the lessee there is a covenant not to assign without license, and on the part of the lessor not to withhold, unreasonably or vexatiously, the granting of a license. The lessee, bound by this covenant, entered into an agreement, for valuable consideration, to assign to the Plaintiff, but expressly subject to the approval of the lessor. To justify the refusal of a license, some reasonable objection must be shewn to the person or the purpose. The lessor is bound to shew some reasonable ground for refusing his consent. It is admitted that the Plaintiff is a

(1) Law Rep. 1 Ch. 35; 1 Ch. 1866. (2) 8 D. M. & G. 787; 3 Jur. N.S. 299.

person of high respectability, and also, by the Defendant *Shakerley*, that it was not on account of any objection to the Plaintiff personally that he has refused a license to assign the lease. The refusal of the license is avowedly for the purpose of putting an end to the lease altogether. The answer of *Shakerley* states, as his reason for refusing the license, that it is a matter of importance to him to get in the leasehold interests of his tenants, for the purpose of rebuilding the premises. But this is a purpose not contemplated by the lease. The lease by *Shakerley* is a demise unto *McArthur*, his executors, administrators, and assigns, and this entitled him to assign to another person, if there should be no reasonable ground, within the terms of the covenant, on the part of *Shakerley* for refusing his license. The question now is, whether or not there was any power in the lessor, who has contracted to allow his lessee to assign where he might reasonably assign, to refuse to allow the lessee to assign at all, because he wishes him to give up the lease, and himself make a new bargain with the lessee. In my opinion, no lessor has a right to use a stipulation in a covenant of this kind, so as to defeat the right of the lessee to assign, where the assignment or agreement for an assignment has been honestly made. The lessee being entitled to assign according to the provisions of this lease, and the lessor's refusal to grant his license being an unreasonable refusal, the Plaintiff is entitled to a decree to compel the lessor to concur in the assignment, and for the specific performance of the agreement.

The conduct of the Defendant *McArthur*, in assigning the lease in trust for his lessor, and the dealing pursued by the Defendant *Shakerley*, for the purpose of defeating the right of the Plaintiff, and the obtaining, by the Defendant *Broughton*, a person of *Shakerley's* own nomination, execution of the assignment from the Defendant *McArthur*, compel me to come to the conclusion that justice will not be done to the Plaintiff if he has not a decree for costs against all the Defendants. The Plaintiff asks for compensation in damages, in respect of the injury he has sustained through the conduct of the Defendant *Shakerley;* and it seems to me that he is entitled to a declaration to that effect, because upon the faith that *Shakerley* would not unreasonably refuse his license to assign, he entered into an agreement with some of the under-

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tenants, which was put an end to. There must be a reference to inquire what is the proper sum to be allowed to the Plaintiff, in respect of the damages which he has sustained by reason of the refusal of the Defendant *Shakerley* to grant a license to assign; and there must be a declaration that the Plaintiff is entitled to specific performance of the agreement concluded on the 3rd of August, 1864; that the refusal of the Defendant *Shakerley* to grant a license to assign was unreasonable and vexatious, and that the assignment by the Defendant *McArthur* to the Defendant *Broughton* must be set aside, and a decree that the assignment to be executed by the Defendant *McArthur* to the Plaintiff, must be concurred in by the Defendant *Shakerley*, and be settled in Chambers, in case the parties differ, and an order that the Plaintiff must be paid his costs by all the Defendants.

Solicitor for the Plaintiff: Mr. *Chapple.*

Solicitors for the Defendant, *McArthur:* Messrs. *Carritt & Son.*

Solicitors for the Defendants, *Shakerley & Broughton:* Messrs. *Gregory, Rowcliffes, & Rawle.*

V.-C. S. 1867 Feb. 28.

HARPER *v.* POLE.

County Courts Equitable Jurisdiction Act (28 & 29 *Vict* c. 99)—*Sheriffs' Court in the City of London—Appeal.*

2 W.R. 119 5 Jur. N.S. 248

The Sheriffs' Court in the City of *London* is not a County Court within the meaning of the 18th section of the 28 & 29 Vict. c. 99 (the *County Courts Equitable Jurisdiction Act*), and consequently there is no appeal under the Act from the Judge of the Sheriffs' Court to the Vice-Chancellor.

THIS was a motion, on behalf of the Plaintiffs, that *Robert Malcolm Kerr*, Esq., the Judge of the Sheriffs' Court, in the City of *London*, might be ordered to settle, and sign, and remit to this Court, a case for the opinion of His Honour, of and concerning the proceedings in this plaint in equity, with a view to and for the purpose of an appeal to this Court against the decision of the Judge of the Sheriffs' Court in the plaint, and to remit to this

But see now 30 & 31 Vict c 142. s 35.

Court the proceedings in the plaint, or proper copies thereof, or otherwise, as His Honour might think fit in the matter.

The plaint was filed under the provisions of the 28 & 29 Vict. c. 99, in August, 1866, and on the 31st of October, 1866, the Judge of the Sheriffs' Court, in the City, dismissed it with costs. The Plaintiffs, on the 26th of November, 1866, gave notice of appeal, and prepared a draft case, but the Defendant's solicitor refused to settle it. The case was then submitted to the Judge of the Sheriffs' Court, and he, on the 24th of January, 1867, having appointed that day for the purpose of settling it, intimated that he was of opinion that no appeal lay from his decisions, and declined to settle the case.

The notice of motion had been served upon the Registrar of the Sheriffs' Court, and upon the Defendant's solicitor.

Mr. *T. A. Roberts*, for the motion:—

The course now pursued for the purpose of raising the question whether there is any appeal from the Sheriffs' Court to this Court, under the *County Courts Equitable Jurisdiction Act* (28 & 29 Vict. c. 99), has been suggested by the Judge himself, and this motion will raise the same question as if the Plaintiffs had applied for a mandamus. The 28 & 29 Vict. c. 99, s. 1, sets forth the matters of which the County Courts are to take cognizance, and the 4th section enacts that the Judge and officers of the City Court (and that and the Sheriffs' Court in the City are the same), shall exercise the like jurisdiction and powers, in all respects, as are exercised by the Judge of a Metropolitan County Court, and the Judge of the City Court shall conform to the rules and orders made under the authority of the Act; and the 18th section enacts, that if any party in a suit or matter under the Act, shall be dissatisfied with the determination or direction of a Judge of a County Court on any matter of law or equity, such party may appeal from the same to the Vice-Chancellor authorized under the Act. The 16th section of the Act directs that rules and orders for regulating the practice of County Courts under the Act shall be framed, and the 19th Order sets forth how an appeal under the 18th section, against the determination or direction of a Judge of a County Court, shall be prosecuted. The 9 & 10 Vict. c. 95, s. 142, enacts, that the

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words 'County Court' shall be understood to mean any Court holden under the Act; and that Act, and any Act amending the same, and the 28 & 29 Vict. c. 99, are, by sect. 21 of the last-mentioned Act, to be read and construed as one Act; and the 19 & 20 Vict. c. 108, s. 43, enacts, "that no writ of mandamus shall henceforth issue to a Judge of the County Court for refusing to do any act relating to the duties of his office, but any party requiring such act to be done, may apply to any superior Court, or a Judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such Judge, and also the party to be affected by such act, to shew cause why such act should not be done, and if, after the service of such rule or summons, good cause shall not be shewn, the superior Court, or Judge thereof, may, by rule or order, direct the act to be done, and the Judge of the County Court, upon being served with such rule or order, shall obey the same on pain of attachment."

Mr. *C. T. Simpson*, for the Defendant, interposing, said:—

The proper course to have pursued would have been by mandamus. Although the Judge of the Sheriffs' Court has jurisdiction in the matter, there is not, under sect. 18 of 28 & 29 Vict. c. 99, any right of appeal to this Court, and therefore this Court has no jurisdiction to hear this motion.

Mr. *Roberts*:—

In *Foster* v. *Green* (1), a County Court Judge, upon a special verdict, entered the verdict for the Defendant, with leave to the Plaintiff to move to enter it for himself, or for a new trial, and the Judge having subsequently refused the application for that purpose, it was held, by the full Court of Exchequer, that the Plaintiff had a right of appeal from the decision of the County Court Judge. Reading all these sections of the various Acts together, I submit that the City Court is a County Court for the purposes of relief under these Acts, and for the purposes of appeal to this Court under the 28 & 29 Vict. c. 99, and also, that an order can, under the 43rd section of the 19 & 20 Vict. c. 108, be

(1) 6 H. & N. 793.

made upon this motion, which will be obligatory upon the Judge of the City Court, to settle, and sign, and remit this case.

Mr. *Simpson*, was not called upon.

No one appeared for the Judge of the Sheriffs' Court.

SIR JOHN STUART, V.C.:—

The simple question is, whether the Sheriffs' Court in the City of *London* is a County Court within the meaning of the 18th section of the 28 & 29 Vict. c. 99, and whether that section, which authorizes an appeal from the determination or direction of a Judge of a County Court, also authorizes an appeal from the determination or direction of the Judge of the Sheriffs' Court. It was argued that the 4th section of 28 & 29 Vict. c. 99, has an operation which entitles suitors in the Sheriffs' Court in the City to consider that that Court is a County Court.

The scope and purpose of the 4th section seem to be very plain, and they are, that Courts other than County Courts shall conform to the rules and orders made, under the authority of the Act, for the County Courts. But this section does not destroy the identity of the Sheriffs' Court, nor make it a County Count. On the contrary, it shews that certain Courts, which are not County Courts, shall regulate their proceedings by the rules and orders made for the regulation of the County Courts. Upon this section it is very difficult to say that the Sheriffs' Court in the City was made a County Court for the purpose of appeal to this Court; indeed, I think the latter words of the section would, if any doubt existed, remove it, for they are, that "the Judge of the City Court shall conform to the rules and orders made under the authority of the Act." The Court remains the City Court, although the Judge is to conform to the rules and orders made for the County Courts.

There is nothing in the 4th section either to extend the operation of the 18th section, which authorizes an appeal to this Court, or to enable me to say that there can be an appeal from any other than a County Court. This plaint is intituled in the Sheriffs' Court, and that being so, it is not a plaint in a County Court. The Judge of the Sheriffs' Court is directed to act upon rules and

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orders made for the County Courts; but that is not a sufficient reason for holding that his Court has ceased to be the Sheriffs' Court and has become a County Court. As I have no authority to entertain an appeal from the Sheriffs' Court in the City of *London*, this motion must be refused with costs.

Solicitor for the Plaintiffs: Mr. *F. Hatton.*
Solicitor for the Defendant: Mr. *H. Lloyd.*

BOOTH *v.* CARTER.

M. R.
1867
Feb. 13.

Will—Charity—Mortmain—Bequest towards the erection of a Chapel.

A bequest to the trustees of a particular chapel in *C.*, to be applied towards the erection of a new chapel in *C.*:—

Held valid, where there was land, duly vested in the trustees at the date of the will, on which a new chapel could be built in substitution for the old one.

JOHN TURNER, by his will, made in 1865, gave the following bequest: "To the Trustees of the Wesleyan Chapel in St. John's Street, Chester, the sum of £1000, to be applied towards the erection of a new Wesleyan Methodist Chapel in Chester."

The testator was a trustee of the Wesleyan Chapel in his will mentioned.

A suit was instituted by one of the residuary legatees for the administration of the estate, and the question arose, on further consideration, whether the bequest was void under the *Statute of Mortmain*.

It appeared from the affidavit of one of the trustees of the said chapel, that the trustees were, and had been prior to the date of the will, possessed of a piece of land in *St. John Street, Chester*, upon part of which the chapel stood, and also of other pieces of freehold land in the same street, large enough and suitable for the site of a chapel, which pieces of land had been duly conveyed to the trustees in mortmain. He further stated, that the trustees had, in 1864, entered into a negotiation for the purchase of land in another street in *Chester*, of which the testator was aware, and that they had come to the resolution, in which the testator concurred, to erect thereon a new chapel.

Mr. *Lindley* (Mr. *Selwyn*, Q.C., with him), for the Petitioner:—

This bequest is void under the *Statute of Mortmain*. The evidence shews that the trustees were negotiating for the purchase of other land; and it may be assumed, as the testator was aware of and concurred in such intention, that he intended the money to be laid out in the purchase of that land.

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[The MASTER OF THE ROLLS:—Any evidence relating to the land vested in the trustees can be received, but I must disregard all that relates to the intentions of the testator.]

In *Trye* v. *Corporation of Gloucester* (1), a bequest for the erection of buildings for a charitable object, in case some person should within ten years provide the land whereon to build, accompanied by a prohibition against a purchase, was held to be void. In *Philpott* v. *Governors of St. George's Hospital* (2), the legacy was only upheld upon the ground that there was an express direction in the will that the bequest should not be applied in the purchase of land. In *Dent* v. *Allcroft* (3) a question arose as to two bequests, one of £6000, to be applied in establishing, endowing, maintaining, or supporting almshouses at *S.*, followed by a direction that the trustees were to have regard to the application of the bequest being "consistent with the laws then in force;" the other bequest was of £2000 for establishing a school at *S.*, "or otherwise for school purposes." There your Lordship upheld both legacies; but in the one case, on the ground that the testator, by reference to the laws then in force, or the *Statute of Mortmain*, had precluded the purchase of land; in the other, because of the alternative gift, "for other school purposes," for which a bequest would be perfectly valid. The whole judgment shews that, but for these directions, your Lordship would not in that case have established the bequests.

Mr. *Eddis*, for another residuary legatee:—

In the case of *Sewell* v. *Crewe-Read* (4), a legacy was directed to be applied in these words, "in building the parsonage at *C.* in manner as I have already promised the same." There your Lordship upheld the legacy, on the ground that the testator had distinctly indicated an intention that it was to be laid out, not in the purchase of land, but in building a house on glebe land, or land already purchased Here the legacy is left in terms which would allow the land to be purchased. The negotiations for the purchase of the site of the proposed new chapel were only *in fieri*, and were not completed in the testator's lifetime.

(1) 14 Beav. 173.
(2) 6 H. L. C. 338, 3 Jur. N.S. 1269
(3) 30 Beav. 335, 8 Jur. N.S. 112
(4) Law Rep. 3 Eq. 60.

Mr. *C. Hall*, for the trustees of the chapel, was not called upon.

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LORD ROMILLY, M.R.:—

I am of opinion that this is a valid legacy. The case, perhaps, goes a shade further than the other cases referred to; but as it is clear that there was land already duly conveyed to the trustees, on which a new chapel might be built in substitution for the old one, the legacy must be upheld.

Solicitors for the Petitioner: Messrs. *Tatham & Procter*, agents for Messrs. *Barker & Hignett, Chester.*

Solicitors for the Trustees: Messrs. *Chester & Urquhart.*

ROFFEY *v.* BENT.

M. R. 1867 Feb. 13.

Settlement—Forfeiture—Effect of Words "suffer any Act"—Charging Order.

Under a settlement the dividends of the trust fund were payable to *B.* for his life, or until he should assign or incumber the same, "or until he should do or suffer any act" whereby the dividends should become payable to another person. A judgment creditor of *B.* obtained a charging order against the trust fund:—

Held, that under the words "shall suffer any act," a forfeiture had accrued of *B.*'s life interest.

THIS was a suit by a judgment creditor to enforce a charging order obtained by him against *J. T. Bent*, whereby the sum of £3500 consols, standing in the names of the trustees of a settlement in which he had a life interest, was made chargeable with the payment of the judgment debt.

By an ante-nuptial agreement entered into by *Bent* he agreed that, on his then intended marriage taking place, the sum of £5000 should be held by the trustees of a settlement to be afterwards executed upon the following trusts:—

"Upon trust to invest and pay the interest and dividends unto me for my life, or until I shall assign, charge, or incumber the same, or shall become bankrupt, or until execution shall be levied

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against my goods or chattels, or "until I shall do or suffer any act" whereby the same interest and dividends, if simply and absolutely payable to me, would belong to or become payable to any other person; and from and after my decease .... or upon my doing or suffering any act whereby the same interest and dividends, if simply and absolutely payable to me, would belong or become payable to any other person," then upon the trusts therein mentioned.

By a post-nuptial settlement, made in pursuance of the said agreement, the trust property was settled upon the same trusts as those before mentioned, with a similar clause of forfeiture.

The trust property was now represented by a sum of £3500 consols, vested in the trustees.

The Plaintiff, having recovered judgment against *Bent* in an action, obtained an order in the Court of Common Pleas that all the interest of the Defendant *Bent* in the sum of £3500 consols, which then represented the trust fund, should stand charged with the payment of the judgment debt.

The bill was filed against the trustees of the settlement and *Bent* and his wife as Defendants, and prayed that, in default of payment by *Bent* of what was due in respect of the judgment debt, his interest, if any, in the sum of £3500 consols might be ordered to be sold, and the proceeds applied in payment of what should be found due in respect of it.

The question in the case was whether the charging order occasioned a forfeiture of the life interest of the Defendant *Bent* under the settlement.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

The clause of forfeiture is imperfect, and does not contain the usual words, "or if any event shall happen whereby, &c." The only words which can possibly be applicable to the present case are the words "until I shall do or suffer any act."

In *Seymour* v. *Lucas* (1), Vice-Chancellor *Kindersley* held that, under a proviso by which a life interest in certain rents was to be determined if, by the act or default of the tenant for life, or by operation of law, or otherwise howsoever, the rents should

(1) 1 Dr. & Sm. 177.

become vested in, or payable to, or vested in any other person, a judgment entered against him would not by itself deprive him of his interest. The word "suffer" in law has an active signification: it cannot apply to an adverse judgment, or to an act *in invitum*, like a charging order, which is a collateral act, from which a man can only escape by paying the money. The clause must be construed strictly; and, as the judgment and charging order are not literally within the words on which forfeiture is to accrue, the creditor cannot be deprived of his rights.

Mr. *Kelly*, for the Defendants, was not called upon.

LORD ROMILLY, M.R.:—

I am of opinion that the word "suffer" in the clause in question is used in its passive and not in its active signification. It may, undoubtedly, be used in an active sense; but when the words "shall do or suffer any act" are used, it is to be understood as meaning to endure or sustain, and to apply to something being done *in invitum*. I find, on referring to Dr. *Johnson's* Dictionary, that "to suffer" is said to mean "to bear, to undergo, to endure, to support." In this case the charging order is an act done against a person's inclination, by which he ceases to have an interest in the trust fund; and consequently I am of opinion that a forfeiture has accrued, and the bill must be dismissed, with costs.

Solicitors for the Plaintiff: Messrs. *Peacopp & Watson.*

Solicitors for the Defendants: Messrs. *Wilde, Rees, Humphry, & Wilde*, agents for Mr. *A. L. Laing, Colchester.*

M. R.

1867

March 1, 6.

PARKER *v.* BUTCHER.

*Building Society—Reasonable Fine—Penalty—Mortgage—*6 *&* 7 *Will.* 4, *c.* 32, *s.* 1.

The rules of a benefit building society empowered the society to advance to its members the amount of their shares, repayable by monthly contributions covering principal and interest, and imposed fines for non-payment of the contributions at the rate of a shilling per pound per month :—

Held, that the fines were reasonable within the meaning of the 1st section of 6 & 7 Will. 4, c. 32, and were not within the doctrine of equitable relief against penalties, but that they did not carry interest; and that a borrowing member could not redeem a mortgage to the society without paying the fines which he had incurred.

THIS was a suit by a borrowing member of the *Sheffield and South Yorkshire Benefit Building and Investment Society* against the trustees of the society, praying (1) for a declaration that the fines imposed by the rules of the society upon borrowing members, for non-payment of monthly advance repayments, were not reasonable within the meaning of the 6 & 7 Will. 4, c. 32; (2) for the repayment to the Plaintiff of £200, received by the trustees in respect of an insurance of property mortgaged to them to secure the repayment of the Plaintiff's advanced shares; (3) for an account (if necessary) as in a redemption suit, and payment to the Plaintiff of so much (if anything), as the society should be found to have been overpaid.

The rules of the society, which had been duly certified by the Registrar of Friendly Societies, contained the following provisions:—

"Rule 3. Each share shall be of the ultimate value of £100.

"Rule 4. The society will make advances to its members for terms of five, seven, ten, twelve, or fourteen years, repayable by monthly or quarterly contributions, covering principal and interest, at the rates hereafter specified, viz.: Repayment of a loan of £100 and interest for a term of . . . . ten years . . . . monthly, £1 2*s.* 8*d.* . . . . .

"Rule 5. The fines for non-payment of monthly advance repayments shall be at the rate of 1*s.* per pound per month on the amount thereof."

Rule 7 provided that buildings mortgaged to the society should

be insured by the mortgagor in the names of the trustees of the society.

"Rule 8. If any member, who shall have obtained an advance, shall be desirous to sell the property mortgaged, it shall be lawful for the purchaser, on becoming a member of the society, to take the property subject to such mortgage, and thenceforth to become answerable for the payment of all advance repayments and fines then due, as well as for all advance repayments and fines to become due, in respect of such mortgaged property. . . . .

"If any member be desirous of having his property discharged from the mortgage before the expiration of the term for which it was originally taken, he shall be allowed to do so, and on payment of all advance repayments, and any fines due in respect thereof, and of the present value of the future repayments calculated to the end of the original term, and discounted after the rate of 5 per cent. interest, as laid down in rule 6, together with a redemption fee of 5*s.* per cent. on the balance so due, the trustees for the time being shall, at the request of the directors, and at the cost of the member, cause to be indorsed on the mortgage deed a receipt or acknowledgment for the full payment of the amount secured in such mortgage in the form annexed to these rules, according to the Act 6 & 7 Will. 4, c. 32, s. 5, or reconvey the property as they may be advised."

S. Bacon became a borrowing member of the society in 1855, in respect of sixteen, and in 1857 in respect of three, £100 shares, to be repaid in ten years by monthly instalments, and be executed a mortgage of freehold and leasehold property to the trustees for securing the payment of all the subscriptions, fines, and other moneys to become due and payable in respect of the shares. The mortgage contained powers of entry, receipt of rents, and sale, and for the appointment of a receiver.

In February, 1862, the Plaintiff purchased *Bacon's* equity of redemption, and thereby, according to the rules of the society, became a member, and liable for the monthly instalments and fines then due, and thereafter to become due, in respect of the nineteen shares. Four instalments, for the months of November, 1860, September and December, 1861, and January, 1862, were then

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unpaid. The Plaintiff did not pay these, but he paid all the subsequent instalments. In December, 1863, the secretary applied to the Plaintiff to pay £107 3*s.* 10*d.* for five instalments (including the four left unpaid by *Bacon*) and to pay the fines thereon, amounting to £145 1*s.* 6*d.* On the 4th of January, 1864, the Plaintiff paid to the secretary £107 3*s.* 10*d.* In June, 1864, he gave notice to the society that he desired to redeem the mortgage, and that he was prepared to pay all the remaining contribution and interest moneys, with a reasonable amount for fines, but that he objected to pay the £145 1*s.* 6*d.* The secretary replied that the directors could not depart from the rules as to fines, and that the non-payment of the fines had involved their increase month by month up to that time; and on the 23rd of November, 1864, he stated, in a letter to the Plaintiff, that £134 remained due from the Plaintiff on his loan account in respect of repayments, upon which a discount of £2 12*s.* would be allowed for present payment, and that the fines, by reason of non-payment, had increased to £248, and would go on accumulating until discharged. In December, 1864, the Plaintiff tendered to the society £179 14*s.* 8*d.* (being the amount due in respect of the future instalments, less discount, together with a sum by way of fines equivalent to interest at 20 per cent. per annum on the four instalments in arrear up to January, 1864), and demanded the return of the mortgage deed with a statutory receipt indorsed, and of the title deeds of the mortgaged property. The society accepted the £179 14*s.* 8*d.* "on account," but refused to indorse the mortgage or give up the deeds. In August, 1865, some buildings on the mortgaged property, which were insured in the names of the trustees of the society, were burnt down, and in November, 1865, the society received £200 from the insurance society, and thereupon they indorsed the mortgage with the statutory receipt, and gave up the deeds to the Plaintiff. The Plaintiff then required them to repay the £200 insurance money, and upon their refusal he instituted this suit.

The Defendants, by their answer, alleged that the £107 3*s.* 10*d.* paid by the Plaintiff in January, 1864, was paid on account generally, and a good deal of evidence was gone into on both sides upon that point.

Mr. *Selwyn*, Q.C., and Mr. *Marten*, for the Plaintiff:—

By the 6 & 7 Will. 4, c. 32, s. 1, the rules of a benefit building society are required to be "proper and wholesome" rules, and not repugnant to the general laws of the realm; and the fines, penalties, and forfeitures which the society is authorized to impose upon its members are to be "reasonable." It is submitted that the rule of this society which imposes a fine of 1*s.* per pound per month, that is to say, a penal interest of 60 per cent. for every instalment of principal and interest due from an advanced member so long as it is in arrear, is improper, and repugnant to the doctrines of this Court, and that such a fine is unreasonable. The repeal of the usury laws has not affected the doctrine of equitable relief against penalties, and, since such repeal, a contract for payment of interest at an exorbitant rate has been set aside: *Croft* v. *Graham* (1).

But even if in the case of unadvanced members of the society, the fine is not unreasonable, the importation of such a penalty into the mortgages given by the advanced members is contrary to the well-established rule of equity, that a penalty in a mortgage for non-payment of the mortgage debt or interest at the stipulated time cannot be enforced; that rule has been applied where the penalty consisted in reviving a debt actually due from the mortgagor to the mortgagee at the date of the mortgage: *Thompson* v. *Hudson* (2). The Plaintiff only became a member of the society by purchasing property mortgaged to the society, so that the true relation between them is that of mortgagor and mortgagee. The mortgage contains powers for enforcing payment of the instalments by entry, appointment of a receiver, and sale; the imposition of a penal interest is, therefore, unnecessary for the security of the society. It will be said that, by the Friendly Societies Acts, which are incorporated with 6 & 7 Will. 4, c. 32, the rules of the society, having been certified by the Registrar, are made binding on the members; but the Registrar's certificate cannot give validity to rules which are repugnant to the laws of the realm. The Plaintiff has tendered interest at 20 per cent. for the time during which the instalments remained unpaid, and that is all that the Defendants were entitled to.

But, assuming the fines to have been reasonable, the Defendants

(1) 2 D. J & S. 155. (2) Law Rep. 2 Eq. 612; 2 Ch. 255.

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have been overpaid, unless the £107 3*s.* 10*d.* paid by the Plaintiff in January, 1864, can be treated as paid in respect of the fines, and not of the instalments in arrear, so that the fines on those instalments continued to accumulate until the instalments were satisfied out of the insurance money; but it is clearly proved by the evidence that the money was paid in respect of the instalments, and not of the fines. It is evident, from the letter of the secretary, in November, 1864, that he considered the fines to be then unpaid, and to be carrying interest at 60 per cent. Therefore, in any view of the case, a balance is due to the Plaintiff, which must be repaid by the Defendants with interest: *Smith* v. *Pilkington* (1). And as the Plaintiff, before suit, tendered the full amount due, the Defendants must pay the costs of the suit. [They also cited *Fleming* v. *Self* (2).]

The MASTER OF THE ROLLS said that, in his opinion, the fines were not illegal or unreasonable, but that they did not carry interest; and he called upon the Defendants' counsel to shew that the instalments in arrear were not paid in January, 1864.

Mr. *Southgate*, Q.C., and Mr. *Ince*, for the Defendants, contended, upon the evidence, that the £107 3*s.* 10*d.* had not been appropriated by the Plaintiff to any particular portion of his debt to the society, and that the society were entitled to appropriate it, and had appropriated it, to the payment of the fines, leaving the arrears, which carried interest at 60 per cent., unpaid. They submitted, however, that this was a question which would arise in taking the account, and which the Court would not decide at the hearing, and asked for a declaration that the fines were reasonable, and for an account.

March 6. LORD ROMILLY, M.R.:—

The first and principal question in this suit relates to the validity of the fines. It is contended, on behalf of the Plaintiff, that a fine of 1*s.* per pound per month for non-payment of monthly advance repayments is unreasonable, and that it is in the nature of a forfeiture, and therefore illegal. I disposed of this question at the

(1) 1 D. F. & J. 120. (2) 3 D. M. & G. 997, 1 Jur. N. S. 25.

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hearing, and stopped the Defendants' counsel on this point. It is, no doubt, a high rate of interest, but it is one imposed to enforce regularity of payment; and, upon reflection and reconsideration, I see nothing unreasonable in it. It is a matter well understood between the contracting parties, and it is a contract which, in the absence of all fraud or undue pressure, the parties were perfectly competent to enter into. Neither do I see anything in the shape of forfeiture in the transaction. It is true that the Court will not allow a person to contract to receive a given rate of interest, and to stipulate that, if not paid, the rate of interest shall be increased, but this has no resemblance to that case. It is simply such a transaction as the following: one man lends to another £100, to be repaid on a given day, and if it be not repaid on that day, it shall bear interest at the rate of 60 per cent.; that is, no doubt, a high rate of interest, but since the repeal of the usury laws I see nothing illegal in the transaction if there be no concealment and no undue pressure, and the parties perfectly understand and assent to the contract. If, then, such a transaction is legal, does it become illegal because the loan is to be repaid by instalments, as if a man lent another £100 to be repaid by sums of £10 per month, with interest at the rate of 60 per cent. on every instalment unpaid? I think it does not. It is also to be observed that this rule is a constant rule in all benefit building societies; I do not know that the rate of interest is the same, but that a very high rate of interest is charged on unpaid contributions is the universal rule, and this has come before the Court in many other cases. It is further to be observed that the rules have been certified by Mr. *Tidd Pratt*, according to the provisions of the Act of Parliament. I am of opinion, therefore, that the Plaintiff fails in the first and principal part of his contention.

The next question is, whether the fines bear interest, and I am of opinion that they do not. They are, as I have already stated, interest agreed to be paid to the society for non-payment of the instalments of the loan; but to give the society interest upon these fines would be to give them compound interest, which is not in the contract, and which is contrary to the rules and principles adopted by Courts of equity.

The third question, which becomes material only in the case of

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no interest being chargeable upon the fines, is this. The society say that the £107 3*s.* 10*d.* paid by the Plaintiff in January, 1864, is to be attributed to payment of the fines, and that, consequently, the four contributions still remained unpaid, and still carried interest. This is contested by the Plaintiff, who insists that the money was paid to and accepted by the society in respect of the contributions. It was in order to determine this point, respecting which both parties have gone into a good deal of evidence, that I took the papers to read, and, having done so, I am of opinion that the Plaintiff is right in this contention, and that the money was expressly paid to the society in respect of contributions, and not in respect of fines, and that it was accepted by the society in that character. [His Lordship then commented on the evidence upon this point, and continued:—] I am of opinion, therefore, that the society were only entitled to retain the amount of the fines due in January, 1864, when that money was paid. The Defendants, by their counsel, ask for an account, but I do not see what account can be taken. Their secretary himself stated the amount of the fines to be £145 1*s.* 6*d.*, and if the Plaintiff agrees to the amount, he is entitled to a decree for payment of the £55 retained by the society. As neither party has succeeded in the whole of his contention, I shall give no costs on either side.

Solicitors for the Plaintiff: Messrs. *Pattison & Wigg*, agents for Messrs. *Wightman & Son, Sheffield.*

Solicitor for the Defendants: Mr. *E. Doyle*, agent for Messrs. *J. & G. Webster, Sheffield.*

In re AGRICULTURISTS' CATTLE INSURANCE COMPANY.

M. R.
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Feb. 11, 21.

SMALLCOMBE'S CASE.

Company—Forfeiture of Shares—Time—Fraud.

Lapse of time is a bar to all proceedings in equity for the purpose of undoing any transaction which is not tainted by fraud; meaning thereby an act involving grave moral guilt.

An arrangement between the shareholders and directors of a company, admitted to have been originally *ultrà vires*, upheld on the ground that lapse of time prevented the transaction from being impeached, although the books of the company accessible to the shareholders did not shew the real nature of the transaction.

Brotherhood's Case (1) followed.

Spackman's Case (2), and *Stewart's Case* (3), not followed.

THIS was an application on the part of the official liquidator of the *Agriculturists' Cattle Insurance Company*, to place the executors of Mr. *Smallcombe* on the list of contributories in respect of 250 shares. The facts relating to the history of the company are stated in the report of *Stanhope's Case* (4).

Mr. *Smallcombe* became a shareholder in July, 1847, and subsequently received a dividend and paid calls in respect of his shares. He attended the meeting at *Chippenham* on the 13th of November, 1848, and apparently accepted the terms of what is known as the "*Chippenham* arrangement" on that day. In accordance with these terms, he ought to have paid to the company the sum of £375 on or before the 13th of December, 1848, but he did not do so, and some time afterwards applied to the directors for an extension of the time of payment. By a resolution of the board of directors, made on the 24th of April, 1849, it was agreed to accept a bill for £375 in payment of the sum which Mr. *Smallcombe* ought to have paid.

The bill was paid in August, 1849, and, at a meeting of the board of directors held on the 5th of September following, a resolution

(1) 31 Beav. 365, (3) Law Rep. 1 Ch. 511,
(2) 34 L. J. (Ch.) 321, (4) Ibid. 161,

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was passed to the effect that the shares standing in Mr. *Smallcombe's* name should be cancelled.

Mr. *Smallcombe* died in 1861.

Affidavits had been filed by several shareholders to the effect that they never assented to the *Chippenham* arrangement.

Mr. *Selwyn*, Q.C., and Mr. *Bush*, for the official liquidator:—

It was the essence of the *Chippenham* arrangement that the retiring shareholders should pay their contributions on or before the 13th of December, 1848. Mr. *Smallcombe* did not perform his part of the contract, and he is therefore not entitled to the benefit of the compromise. The case in this respect is exactly within the decision in *Stewart's Case* (1). It was assumed in *Brotherhood's Case* (2), that every shareholder acquiesced in the *Chippenham* arrangement, but we have now evidence to shew that this was not so.

THE MASTER OF THE ROLLS:—In my opinion, all these cases are identical in principle with *Brotherhood's Case*, and are governed by it; but the question is, whether *Brotherhood's Case* has not been overruled.

Mr. *Pearson*, Q.C. (Mr. *Winterbotham* with him), for the executors of Mr. *Smallcombe*, referred to the close of Lord *Westbury's* judgment in *Spackman's Case* (3).

Feb. 21. LORD ROMILLY, M.R.:—

After reading the papers in this case carefully, I am unable to see any substantial distinction between this case and *Brotherhood's Case*. Mr. *Smallcombe* attended both the meetings which constituted the *Chippenham* arrangement. He signed the agreement, and paid the money; and the only difference between this case and *Brotherhood's Case* is, that the money was paid by *Smallcombe* tardily, and after some compulsion, but it was accepted, and the arrangement entered into by him was completed.

(1) Law Rep. 1 Ch. 511. (2) 31 Beav. 365. (3) 34 L. J. (Ch.) 321.

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Both in this case and in *Brotherhood's Case* (1), the time appears to me to bar any right which might originally have existed to set aside the transaction. The winding-up order was made in April, 1861, more than twelve years after the transaction, and his executors (for *Smallcombe* died in 1861) are not attempted to be put on the list of contributories until 1867, six years after the winding-up order was made.

The official liquidator relies on the fact that the matter was not made known to all the other shareholders of the company in order that they, being aware of it, might choose to acquiesce or not as they pleased in the matter, and (by so acquiescing) preclude themselves from questioning what had been done. This was manifestly impossible, as many of the shareholders in this case were under disability, and could not acquiesce in anything.

If anything would follow from this, it would appear to me it would follow that no time could prevent the other shareholders from opening the transaction, although they had been for many years receiving large dividends.

The entry made by the directors in the book is treated as a false entry, and although it is one over which the seceding shareholder could have no control, and though he was wholly ignorant of it, yet it is argued that this constitutes a suppression of truth, that the suppression of truth is a fraud, and that the shareholder must be made liable for the fraud committed by the directors, although it was done by the directors without any sinister object or motive, although it was a matter by which they gained nothing, and although it is proved by the evidence that they *bonâ fide* believed they were acting in a manner most beneficial to all the other shareholders. I must say, that to treat such a transaction as a fraud, and, in consequence, to say that no time can condone the irregularity of the transaction, is, in my opinion, to confound moral principles, and to introduce an element of great confusion into the doctrine of Courts of equity, the fundamental principle of which, as regards fraud, is, as it appears to me, that nothing can be called fraud, and nothing can be treated as fraud, except an act which involves grave moral guilt. I feel strongly, and I have frequently endeavoured to point

(1) 31 Beav. 365; 1 Jur. N. S. 905.

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out, the injurious consequence of allowing such expressions to be used as "equitable fraud," or, "that which Courts of equity call fraud," or, "constructive fraud," when, in fact, no act has been done by any one which involves moral culpability. The only exception that I am aware of is, that the phrase "constructive fraud" has been sometimes applied to cases where an innocent partner is made liable for the fraudulent acts of his co-partner. The expression is not a proper one even there, because the innocent partner has been guilty of no fraud, but he is, in many cases, properly made liable for, and compelled to redress, the wrong committed by his really fraudulent co-partner.

In my opinion the doctrine is admirably stated in a very celebrated judgment of Sir *William Grant* in *Beckford* v. *Wade* (1), in which that Judge says:—"It is certainly true, that no time bars a direct trust, as between *cestui que trust* and trustee; but, if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief."

I am of opinion, therefore, that I must say Mr. *Smallcombe's* executors are not to be put on the list of contributories.

Solicitors for the Official Liquidator: Messrs. *Horn & Murray.*
Solicitors for the Executors: Messrs. *Wood, Street, & Hayter.*

(1) 17 Ves. 87, 97.

RANSOME *v.* BURGESS.

V.-C. K.
1866
Nov. 6.

Marriage Settlement—Trust for Maintenance—Ability of Father.

By a marriage settlement, the trustees were to stand possessed of £2000 (coming from the wife's father), upon trust after the decease of the wife for the children of the marriage equally, their shares to be vested at twenty-one or marriage; with a proviso, that until the principal should become payable to the children, the trustees should apply the whole, or so much of the dividends as they should think fit, for the education or maintenance of such children. The wife died, leaving one child:—

Held, that this was a discretionary trust for maintenance, and not simply a power, and that the father was entitled to have an allowance for past and future maintenance of his child, without reference to his ability to provide such maintenance; and an inquiry was directed as to the *quantum* to be so applied.

THIS bill was filed on behalf of *Sarah Jane Ransome*, an infant, by *James Edward Ransome*, her next friend, against *Robert Charles Ransome*, the father of the Plaintiff, and the trustees of his marriage settlement.

By an indenture of settlement, dated the 23rd of October, 1854, made upon the marriage of *R. C. Ransome* and *Sarah*, his wife, it was declared that the trustees should stand possessed of a sum of £2000 (which had been paid over to them by *Richard Baker*, the father of the intended wife) upon trust, after the marriage, to invest the same in manner therein mentioned, and to pay the interest, dividends, and annual produce thereof, to the wife for life, for her separate use, and after her decease upon trust to stand possessed of such interest, dividends, and annual produce, in trust for all the children of the marriage, as the husband and wife should appoint, and in default of appointment, then as the wife should by deed or will appoint, and in default of such appointment, and after the decease of the wife, in trust for all the children of the marriage equally, and if only one child, then for such only child, the share or shares of such child or children to be vested at the age of twenty-one, or in the case of daughters at twenty-one or marriage, and to be paid and transferred to him, her, or them accordingly: Provided always, and it was thereby agreed, that

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after the decease of the intended wife, and from thenceforth, until the principal of the trust moneys, or any portion thereof, should become payable to any child or children of the marriage, or to his, her, or their representatives, under the trusts thereinbefore declared, the trustees should receive the interest, dividends, and annual produce of the trust funds, or of such portion or respective portions thereof as should not have become payable, as the same should from time to time arise and become due and payable, and pay and apply the whole of such interest, dividends, and annual produce, or so much thereof as they should think fit, for or towards the education or maintenance of such child or children respectively. And in case there should be no issue of such marriage, or in case the said trust moneys should not become vested in any such child or children, the trustees were to stand possessed of the principal of the said trust funds, or of so much thereof as should not become vested as thereinbefore mentioned, and of the interest, dividends, and annual produce thereof, from and after the decease of the intended wife, and such failure of issue as aforesaid, in trust for the said *Richard Baker*, his executors, administrators, and assigns.

The Plaintiff was the only issue of the marriage, and she was born on the 14th of August, 1855.

Sarah J. Ransome, her mother, died on the 4th of February, 1856, without having exercised the power of appointment reserved to her and her husband.

The income of the trust funds, which was £85 a year, had been received by the trustees, but no part thereof had, since the death of her mother, been paid or applied to the maintenance or education of the Plaintiff, and the said income had been accumulated and invested by the trustees.

The Plaintiff had been educated and maintained by her father, who now submitted that the income of such trust funds, including the accumulations thereof, ought to be applied to the payment of the past and future maintenance and education of the Plaintiff.

The Plaintiff's father had, in 1864, applied to the trustees to have the accumulations paid to him in reimbursement of the moneys expended by him since his wife's death, in maintaining and educating the Plaintiff, and to have the future income of the trust moneys paid to him, or applied by the trustees, for the like

purpose. The trustees offered to pay him £60 a year out of the income until the Plaintiff attained the age of thirteen, and after that time the whole of the income; but declined to pay any part of the accumulations without the authority of the Court of Chancery.

The bill prayed that it might be declared whether, upon the true construction of the settlement, the income of the trust fund, or a competent part thereof, ought not to be paid to *Robert Charles Ransome*, the father, for the past and future maintenance of the Plaintiff, without reference to his liability to maintain her. And if the Court should so determine, then that the accumulations of such income, or such part thereof as the Court should think fit, might be paid to the father for the maintenance and education of the Plaintiff since the death of her mother, and that the future income of the trust funds, or such part thereof as the Court should think fit, might be paid to the father for the Plaintiff's future maintenance and education.

Mr. *Baily*, Q.C., and Mr. *Whitbread*, for the Plaintiff, took no part in the discussion, leaving it to the trustees to take the active part in opposing the father's claim.

Mr. *Eddis*, for *Robert Charles Ransome*, the father:—

Under the trusts of this settlement, the father has a right to the interest of the money, irrespective of his ability to maintain his child. It is a part of the contract that a portion of the income of the children's property should go to the father during their minority, for their maintenance and education. The settlement recites the intention to make a provision for *Sarah Baker* and *Robert Charles Ransome*, and the issue of the intended marriage. It must, therefore, have been intended that Mr. *Ransome* should take an indirect benefit. This he of course did during his wife's life, by means of the trust for her; but now he can only do so by an application of the income for the maintenance of the child. The clause relating to the application of the dividends after the decease of the wife is in the nature of an express trust to pay, subject only to the discretion of the trustees as to the amount, and it is not a simple power to pay all or any part as the trustees may think

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proper. Moreover, there is no trust in the settlement for the accumulation of unapplied dividends; consequently, no accumulation could have been contemplated: *Mundy* v. *Earl Howe* (1); *Meacher* v. *Young* (2); *Stocken* v. *Stocken* (3).

Mr. *Osborne*, Q.C., and Mr. *Wingfield*, for the surviving trustees:—

It is submitted that the accumulations have become the property of the infant; and the question now is, whether the father is entitled to the whole accumulated fund up to 1864, as well as the future income, notwithstanding that he is of ability to maintain his child, which is admitted? The maintenance clause in this marriage settlement, though in the form of a trust, is really a discretionary power to apply the whole, or part, of the income for maintenance, and the father is not entitled, so long as he is of ability to maintain his child. This was decided in *Thompson* v. *Griffin* (4), where the Court held that the father was not entitled to require that any portion of the income should be applied to the maintenance of his children, so long as he was himself of ability to maintain them. In that case, Lord *Cottenham* said that the decisions in favour of the father had gone quite far enough. In *Meacher* v. *Young*, and *Stocken* v. *Stocken*, the words were different from this clause, since the direction in those cases was to apply the "yearly income," or "the rents and profits," as the trustees should think fit; whereas here, it is to apply the whole, or so much as they should think proper, shewing that it was left in their discretion to apply the income or not, as they should see fit. The trustees have exercised their discretion, and the Court will not interfere with them.

Mr. *Eddis*, in reply:—

The case of *Thompson* v. *Griffin* was decided on the ground of its being a power, and not a trust. In the other cases before cited, there was a trust, and so it is in this case. They are to apply the whole, "or so much as they think proper." It is submitted that the latter words do not prevent there being a trust, which is distinct in the first part of the sentence.

(1) 4 Bro. C. C. 223.
(2) 2 My. & K. 490.
(3) 4 Sim. 152; 4 My. & Cr. 95.
(4) Cr. & P. 317.

SIR R. T. KINDERSLEY, V.C.:—

I am of opinion that this case is governed by the cases which have been cited, though I must confess that I am not satisfied with some of the reasons therein assigned for the conclusions arrived at. But it is not for me to overrule those decisions; I am bound to follow them; and they constrain me to come to the conclusion, that the father is in this case entitled to have applied for the maintenance of the child so much of the income as is necessary for that purpose, without reference to his own ability.

The first case cited is *Mundy* v. *Earl Howe* (1); and it appears to me that the proviso for maintenance in the case now before me, though not expressed in exactly the same terms, is in substance and effect the same as in that case. In this case, as in that, the language of the proviso for maintenance, expresses a trust to pay and apply the whole or some part of the dividends for that purpose, with a discretion in the trustees as to the amount to be so applied. It does not say that it shall and may be lawful for the trustees to apply the whole of the income, or so much as they may think fit, but it is a trust to apply to such maintenance the whole income, or so much as they may think fit. Moreover, in this case, as in *Mundy* v. *Earl Howe*, the question arises under a marriage settlement.

The Lord Chancellor, in giving judgment in *Mundy* v. *Earl Howe*, said (2), "In this case the child is entitled to the whole interest; but nothing is vested till twenty-one or marriage. It is perfectly clear from the cases, that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child; but in this case it is part of the execution of the trust contained in the contract." I understand that passage to mean, that if the property had been given by will upon the very same trusts, and with a proviso for maintenance expressed in the very same language, the father, if of ability to maintain the child, would not have been entitled to have any part of the income applied for that purpose; but that when the same trusts, with the same proviso for maintenance, are contained in a marriage settle-

(1) 4 Bro. C. C. 223. (2) Ibid. 226.

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ment, and therefore the creation of them is a matter of contract, the language shall receive a different construction, and the father, though of ability, shall be entitled to have the income applied in the maintenance of his child. With all deference to so high an authority, I feel bound to say that I do not perceive the reasonableness of this distinction. The children of the marriage are as much within the marriage consideration as the husband; and the settlement is a contract made quite as much for their benefit as for his; and inasmuch as the question whether the child should be maintained by the father, or out of the income of the trust fund, raises a conflict of interest between the father and the child, I confess I cannot see why that language, which in a will would be construed in favour of the child, should, when contained in a settlement, receive a different construction in favour of the father, on the ground that it is matter of contract.

Another reason, given in the same case, for deciding in favour of the father, was that the property (all of which belonged to the wife before the marriage) would have become Mr. *Mundy's* (the husband), if there had been no marriage settlement. That reason seems to assume that the marriage would have taken place, even if there had been no settlement.

Another passage in the judgment appears to me somewhat extraordinary. It was referred to the Master to inquire what would be a proper amount to be allowed for the maintenance of the child; but the Lord Chancellor added, "But I think there ought to be a direction to diminish that allowance in respect to the great additional fortune Mr. *Mundy* derives from Lady *Middleton*" (referring to the benefits which he, Mr. *Mundy*, had derived under the will of his wife).

I cannot but think that there must be some mistake in the report; for it is hard to conceive that Lord *Loughborough*, having decided that the father had by contract acquired the right (as against his child) to have so much of the income of the trust fund as would be a proper maintenance for the child applied for that purpose, without any reference to his own ability to maintain her, should in the same breath direct that his means should be taken into account in determining the quantum to be allowed.

The next case is *Meacher* v. *Young* (1). In that case there was not only no language importing discretion as to applying the income, or any part of it, to the maintenance of the children, but there was no discretion even as to the quantum of income to be applied for that purpose. Sir *John Leach*, in his judgment, said it would have come to the husband *jure mariti*, if there had been no settlement: thus assuming that the marriage would have taken place without a settlement; which seems to treat the fund, though coming from the wife, as coming from the husband; because, in the absence of a settlement, he would have taken it *jure mariti*.

In the next case, *Stocken* v. *Stocken* (2), there was a direction to the trustees to apply the rents and profits for maintenance at their discretion; and the Vice-Chancellor, in his judgment, says it was quite clear that the father, notwithstanding that he was of ability to support his children, would have been entitled to have an adequate portion of the rents applied for their maintenance. No reasons are given in the judgment; but *Mundy* v. *Earl Howe* (3) was cited, and the decision was no doubt founded on the authority of that case. The same case came on appeal before Lord *Brougham*; but his lordship never came to any conclusion on it, though on one occasion he expressed his opinion that the case of *Mundy* v. *Earl Howe* appeared to be a decisive authority on the point.

Stocken v. *Stocken* came upon appeal before Lord *Cottenham* (4), who also followed the case of *Mundy* v. *Earl Howe*.

The case of *Thompson* v. *Griffin* (5) also came before Lord *Cottenham*. In that case, a mere power was given to the trustees to apply the income for maintenance; and the Lord Chancellor said, that if the property of the children was derived from the bounty of a stranger, the father, if of ability to maintain his children, could not be entitled to any allowance for that purpose; but that the claim of the father rested upon the distinction which had been taken between the cases in which the property was derived from the bounty of a stranger, and those in which the children were entitled to it under the marriage settlements of their parents, such as in *Mundy* v. *Earl Howe*, *Stocken* v. *Stocken*,

(1) 2 My. & K. 490.
(2) 4 Sim. 152.
(3) 4 Bro. C. C. 223.
(4) 4 My. & Cr. 95.
(5) Cr. & P. 317.

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and *Meacher* v. *Young* (1); but that it appeared to him that the distinction between those two classes of cases had been carried quite as far as could be justified upon principle; and there being only a power to apply the income for maintenance, and not a trust, his Lordship held that the father was not entitled to have the income so applied, as long as he was of ability to maintain his children.

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The result of these four cases seems to be this: that where the trust property is derived from the bounty of a stranger, the father, if of sufficient ability, is not entitled to have the income applied to the maintenance of his children, but that if the trust property is the subject of a marriage settlement, and therefore the creation of the trusts is matter of contract, then, if the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the quantum of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for the maintenance of his children applied for that purpose, without reference to his ability to maintain them; but if the language of the settlement expresses merely a power so to apply the income, or any part thereof, to the maintenance of the children, then the father is not so entitled. How far that result is satisfactory, or founded on sound principle, may fairly admit of doubt. But I cannot set aside the decisions of Lord *Loughborough*, the Master of the Rolls, the Vice-Chancellor, and Lord *Cottenham*, in the cases cited. The only question for me to decide is, whether the proviso for maintenance in the present case expresses a trust, or merely a discretionary power, to apply the income, or some part thereof, for the maintenance of the children. It appears to me that it is a trust to maintain the children out of the income, and that it is only the quantum of income to be so applied which is left to the discretion of the trustees, who, in the exercise of an honest discretion, would, according to the authorities, be bound to apply as much as would be proper and necessary for that purpose, having regard to the children's circumstances and position in life.

There must be an inquiry how much, not exceeding the amount of income for each year, ought to be applied for the maintenance of the child since the death of the mother, and the amount must

(1) 2 My. & K. 490.

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be paid to the father out of the accumulated fund in the hands of the trustees, and there must also be an inquiry how much ought to be applied for such maintenance in future.

The costs of the suit must come out of the accumulated fund; but the father is entitled to past maintenance in priority; and if that fund is insufficient, the costs must be raised out of corpus.

Solicitors for the Plaintiff: Messrs. *Sharpe, Parkers, & Jackson.*
Solicitor for the Trustees: Mr. *R. H. Peacock.*

In re LEEDS BANKING COMPANY.

V.-C. K.
1866
Nov. 15, 16, 26.

MRS. MATTHEWMAN'S CASE.

Winding-up—Contributory—Married Woman—Separate Estate.

The separate estate of a married women is bound by her debts, obligations, and engagements, contracted for herself upon the credit of that estate; and whether such obligations were so contracted must be judged of by the circumstances of each particular case.

There is nothing in the nature of a joint stock company, in the absence of any special clauses in the deed of settlement, to prevent a married woman being a shareholder in her own right, so as to bind her separate estate.

Therefore, where a married woman, having separate estate, contracted to take shares in her own name in a joint stock company, which was afterwards wound up:

The Court, being of opinion that such contract was entered into upon the credit of her separate estate, and that the deed of settlement did not exclude married women from being shareholders so as to bind their separate estate, placed the married woman on the list of contributories in her own right, so as to bind her separate estate.

THIS was an adjourned summons which was taken out on behalf of Mrs. *Elizabeth Matthewman*, a married woman, by her next friend, seeking to have her name struck off the list of contributories under the winding up of the *Leeds Banking Company*, as a contributory in her own right so as to bind her separate estate in respect of fifteen shares.

William Sedman, who died in July, 1859, was the holder of fifty-five shares in the *Leeds Banking Company*, which was formed under the 7 Geo. 4, c. 46, by a deed of settlement dated the 19th of

V.-C. K. 1866 ~~ Mrs. Matthewman's Case.

November, 1832, and by his will he appointed his widow, *Elizabeth Sedman*, his sole executrix and residuary legatee. The will was proved by the executrix in August, 1859, and the probate thereof was left for registration in the shareholders' ledger of the banking company in September, 1859, and was entered as follows:—

"Probate of *William Sedman's* will exhibited at the bank the 3rd of September, 1859, granted to *Elizabeth Sedman* his widow, sole executrix, dated the 23rd of August, 1859. Died the 23rd of July, 1859."

The shares remained so registered till the failure of the bank in September, 1864, and were never transferred into the name of *Elizabeth Sedman*. She never signed the deed of settlement of the company in respect of the fifty-five shares, nor did the directors ever give to *Elizabeth Sedman* notice requiring her to sign the deed of settlement of the company in respect of such shares.

In February, 1864, a dividend was paid by the bank on the shares, which *Elizabeth Sedman* received and gave a receipt for, as being "on fifty-five shares of the capital stock of the company standing in my name;" such receipt was signed "*Elizabeth Sedman*."

In September, 1863, the account of *William Sedman*, who was a customer of the bank, was closed at the request of *Elizabeth Sedman*, and a new account was opened in her name, and headed: "*Elizabeth Sedman*, widow, *Alma House*, *Headingley*;" and the amount standing to the account of *William Sedman* was transferred to the new account.

On the 20th of April, 1864, *Elizabeth Sedman* married Mr. *George Matthewman*, and on that day the following letter was sent by her to the manager of the banking company:—

"Sir,—We beg to inform you that by indenture of marriage settlement, bearing date the 19th of April, 1864, Mrs. *Elizabeth Sedman*, a proprietor of shares or stock in the *Leeds Banking Company*, assigns the same to the undersigned *Alfred Williamson* and *John Hewson*, upon certain trusts, and that the same indenture contains a clause permitting the said trustees to allow such stock or shares to remain invested in the sole name of the said Mrs. *Sedman*, now Mrs. *George Matthewman*, and we have now to inform you that the

marriage took place this day. You are requested to forward all warrants for dividends, or interest, or other communications, to Mrs. *Matthewman, Alma House, Headingley,* near *Leeds.*

"*Elizabeth Matthewman.*
"*Alfred Williamson.*
"*John Hewson.*

"Please enter me a fresh banking account and book on my return.
"*Elizabeth Matthewman.*"

In accordance with this letter the old account was closed, and a new account opened in the name of *Elizabeth Matthewman,* and the amount standing to the credit of the old account transferred to the new account.

The marriage settlement was not produced for inspection at the banking-house of the company, nor had the company any notice of its contents, except such as was given by the letter above set out.

The directors of the *Leeds Banking Company,* having determined on issuing the reserved shares to the old shareholders in the proportion of one reserved share for each five shares held by them, the manager of the bank, on the 22nd of June, 1864, addressed a notice "to the executors of *William Sedman,*" offering them reserved shares in respect of the fifty-five shares held by them, and inclosing a printed form of circular of application. This form Mrs. *Matthewman* returned to the manager, agreeing to take fifteen shares, signed in her own name, *Elizabeth Matthewman;* and, accordingly, fifteen reserved shares were allotted to her; and, on the 3rd of August following, Mrs. *Matthewman* paid the purchase-money for the shares by a cheque drawn by herself on her account with the *Leeds Banking Company,* and the new shares were registered in her own name.

It was admitted that *Elizabeth Matthewman,* after her marriage with Mr. *Matthewman,* from time to time drew cheques in her own name on the *Leeds Bank;* that the money standing to the credit of such account was her separate estate, and that, under her marriage settlement, she was entitled, for her separate use, to considerable personal estate.

The 8th section of the deed of settlement of the company pro-

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vided: "That each shareholder shall be entitled to and interested in the profits, and shall be subject and liable to the losses of the company, rateably and in proportion to his shares in the capital fund or joint stock thereof."

The 14th section of the deed was as follows:—"That the husband of any female proprietor, or the executor, legatee, or administrator of any deceased proprietor, or the guardian or trustee of any proprietor, or the assignee of any bankrupt or insolvent proprietor, shall not, as such, be a qualified proprietor in respect of such shares as shall be vested in him in any of the aforesaid capacities; but any such husband, executor, legatee, administrator, guardian, or trustee, shall be at liberty either to sell and dispose of such shares, in manner and subject to the provisions contained in these presents, or to become a proprietor in the company in respect of such shares, on giving notice in writing to the directors for the time being at the banking-house of the company in *Leeds*, of his desire to become a proprietor, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the proprietor in whose place or right he claims to be admitted, and the number of shares in respect whereof he is desirous of becoming a proprietor; whereupon and upon otherwise complying with the provisions contained in these presents, he shall be admitted and become a proprietor of such shares, and shall have the same transferred into his name accordingly. But any such husband, executor, legatee, administrator, guardian, or trustee, who shall not elect to become a proprietor as aforesaid, and also the assignee of every bankrupt or insolvent proprietor, shall sell and dispose of the shares vested in him in any such capacity, and shall be entitled to receive any dividends, which shall have become due on such shares, before his title to the same shares accrued, but no dividends which may become due on the same shares, after his title shall have accrued, shall be received or demandable by him."

Mr. *Glasse*, Q.C., and Mr. *Cotton*, for the official liquidator:—

Mrs. *Matthewman*, being a married woman, having separate estate, having contracted for shares in the company in her own name, must be placed on the list of contributories in her own right, so as

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to bind her separate estate. The circumstances of this case are such as must lead to the presumption that both Mrs. *Matthewman* and the company were contracting with reference to, and on the credit of, her separate estate, and on the ground of that intention her separate estate will be held liable ; *Jacob's* Note to *Roper* on Husband and Wife (1). The tendency since that time has been to treat a married woman in respect of her separate estate as a *feme sole* : *Johnson* v. *Gallagher* (2), and the cases referred to by Lord Justice *Turner* in his judgment in that case.

The 200th section of the *Companies Act*, 1862, provides, that in the case of an unregistered company, every person shall be deemed a contributory, who is liable at law or in equity to pay or contribute to the payment of any liability. Mrs. *Matthewman*, by her contract to take shares, has in equity bound her separate estate : *Owens* v. *Dickenson* (3) ; *Gaston* v. *Frankum* (4).

Mr. *Baily*, Q.C., and Mr. *Roxburgh*, for Mrs. *Matthewman* :—

There is no case in which a married woman has been placed on the list of contributories in her own right, and so as to bind her separate estate. In this transaction no reference was made to her separate estate ; and that being so, in order to bind it, it must be shewn that both the contracting parties were contracting on the credit of it, and with the intention of binding it ; but there is nothing of the kind here. On the contrary, the offer of the shares in question was addressed to the executors of Mrs. *Matthewman's* first husband, in whose name the original shares were allowed to remain ; Mrs. *Matthewman*, it is true, took them in her own name, but she was the sole executrix of her first husband.

The decision of Lord Justice *Turner*, in *Johnson* v. *Gallagher*, has no bearing on this case ; and it has been questioned by the Master of the Rolls, in *Shattock* v. *Shattock* (5), who considered that the question was, whether the intention was to bind the separate estate.

Mrs. *Matthewman* being a married woman, it was not within the powers of the company to accept her as a shareholder, in respect of

(1) Vol. ii. pp. 241, 243.
(2) 3 D. F. & J. 494.
(3) Cr. & P. 48.
(4) 2 De G. & Sm. 561.
(5) Law Rep 2 Eq. 182.

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her separate estate; and it being against the constitution of the company unless every individual shareholder concurred and gave his consent, she could not be a shareholder; and not being properly a shareholder, Mrs. *Matthewman* cannot be placed on the list as a contributory. The 8th and the 14th sections of the deed of settlement shew clearly the intention that a married woman should not be a shareholder. She could not be "personally" liable for the losses as intended by the 8th section, and the 14th section in terms provides for the husband of a married woman having shares becoming a shareholder. Mrs. *Matthewman's* name, therefore, must be struck off the list of contributories.

Mr. *Glasse*, in reply.

Nov. 26. SIR R. T. KINDERSLEY, V.C.:—

It is not disputed that if Mrs. *Matthewman* had been a *feme sole* she would have been liable to be placed on the list of contributories. The question is whether, being a married woman, and having separate estate, she is to be placed on the list of contributories, so as to make her separate estate liable for the calls under the winding up.

I do not think it necessary to go through and examine the various authorities on the question of the liability of a married woman's separate estate, because I had occasion to do so in the case of *Vaughan* v. *Vanderstegen* (1), in which case I urged the necessity of carefully drawing the distinction between property which is settled as the separate estate of a married woman, and property over which she has merely a power of appointment, which she has exercised—two things perfectly distinct from each other, but very often confounded. To the views I then expressed I fully adhere, and with the more confidence, because they have been sanctioned by the concurrence of the Master of the Rolls, in the subsequent case of *Shattock* v. *Shattock* (2).

Now, what is the law as to the extent to which a married woman may contract obligations, engagements, or debts which the party

(1) 2 Drew. 363. (2) Law Rep. 2 Eq. 182.

with whom she is contracting may insist shall be paid out of her separate estate? That is a moot question; but I think the principle laid down by Lord Justice *Turner*, in *Johnson* v. *Gallagher* (1), is a sound one, and that it is the principle which the Court ought to adopt. As I understand that principle, it is this:—If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned must depend upon the facts and circumstances of each particular case.

It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation.

In the present case, it appears to me that Mrs. *Matthewman* was intending to contract for these shares merely on her own behalf, independently of her husband, and on the credit of her separate estate, and that it was so understood by the company. The fifty-five shares, which she had derived from her first husband, belonged to her in her own right, independently of her second husband. When the offer of new shares was sent to her, addressed "to the executors of *William Sedman*," she accepted them, and they were allotted to her in her own name, as *Elizabeth Matthewman*, and she paid for them by a cheque on the bank, drawn by her against the

(1) 3 D. F. & J. 494; 7 Jur. N.S. 273

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balance standing to her credit in the account which she had with the bank in her own name as *Elizabeth Matthewman*, and which was well known to be part of her separate estate. I think there never was a case in which (though no express reference was made to the separate estate), the circumstances lead so clearly to the conclusion that she was intending to contract, and was understood by the bank to be contracting, not on behalf of her husband, but on her own behalf, independently of her husband, and with reference to and on the credit of her separate estate.

Now, if a married woman, having separate estate, can contract with another person so as to render that separate estate liable, there seems to be no reason why she may not in like manner contract with a joint stock company; and if she may so contract to purchase a horse, or a jewel, or any other chattel, there is surely no reason why she may not equally contract to buy shares in the company for her own separate use. And if she may thus purchase shares, she may of course stand as a shareholder on the register (supposing there is nothing in the company's deed to prevent it), so as to make her separate estate liable in respect thereof; and, if that is so, there is no reason why she should not be placed in like manner on the list of contributories.

Is there, then, anything in the deed of settlement of this company which renders it impossible that a married woman having separate estate should be a shareholder? It has been contended, that, as the 8th section of the deed provides that each shareholder shall be subject and liable to the losses of the company, that cannot apply to a married woman, because a married woman cannot be personally liable for any debt whatever; and the 14th section of the deed, which relates to the case of a woman who has shares marrying, is relied upon as shewing an intention that a married woman should not be a shareholder. But I think it would be straining these clauses much further than was intended by the framers of them, to hold that the company was precluded from admitting a married woman, having separate estate, to be a shareholder in her own right. But even supposing that these rules were intended to create such a prohibition, so that any other shareholder would have a right to object to Mrs. *Matthewman* being admitted as a shareholder, still it would not lie in her

mouth to raise the objection. Such a rule could only be regarded as made for the protection, and in the interest, of the shareholders; and if they are all willing to waive it, they may do so. Now, it is clearly for the benefit of all the other shareholders in the present case not to raise any such objection; and, as they do not raise it, Mrs. *Matthewman* has no right to raise it, in order to escape from her liability. One of two parties to a contract has no right to repudiate it merely on the ground that the other party has the right to repudiate it, where that other party insists on the performance of it.

Under all the circumstances of the case, it appears to me that Mrs. *Matthewman* must remain on the list of contributories, but only so as to render her separate estate liable for calls.

Solicitors for Official Liquidator: Messrs. *Freshfields & Newman.*
Solicitors for Mrs. *Matthewman:* Messrs. *Head & Pattison.*

V.-C. W.
1867
Feb. 28.

In re RUSSIAN (VYKSOUNSKY) IRONWORKS COMPANY.

WHITEHOUSE'S CASE.

Company—Variance between Prospectus and Memorandum—Rectification of Register—Delay.

Post 797

A shareholder having, in August, 1865, given notice of his resolution to retire from the company, and to have his deposit money returned immediately, on the ground of a discrepancy between the articles of association and the prospectus (which discrepancy was corrected in the September following), took no further step till March, 1866, but paid a call in the meantime, and then wrote demanding the return of his allotment money, on the ground of a new discrepancy, of a totally different character, which he had only just discovered. On motion by the shareholder to have his name removed from the list:—

Held, that, having put himself at arms' length with the company in August, 1865, he must be taken then to have known all the grounds of objection on which he intended to rely, and motion refused.

THIS was a motion on behalf of Mr. *John Whitehouse*, that the register of shareholders of the *Russian (Vyksounsky) Ironworks Company Limited*, might be rectified by striking out his name.

The memorandum and articles of association of the company were dated the 26th day of April, 1865. On the 27th of April Mr. *Whitehouse*, having seen the company's prospectus, applied through his broker for thirty shares, and paid £30 deposit money. On the 28th the memorandum and articles were registered. In reply to the application twenty-five shares were allotted to Mr. *Whitehouse*, upon which he paid the further sum of £95.

On the 22nd of August, 1865, he wrote to the directors as follows:—

"Gentlemen,—In consequence of the discrepancy between the prospectus and articles of association in your company, I beg to give you notice that I retire altogether from the company, and request the immediate return of my deposit and such further sum as I may have paid into it."

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The receipt of this letter was acknowledged by the secretary on the 23rd.

A call was subseqently made by the directors, which Mr. *Whitehouse* paid.

On the 19th of March, 1866, Mr. *Whitehouse* having, as he said, had his attention on that day called to the memorandum and articles, and finding that they allowed other objects than those detailed in the prospectus, instructed his solicitor to write the following letter to the directors :—

"I am instructed by Mr. *Whitehouse* to apply to you for the return of the sum of £125 paid by him to you on the allotment of twenty-five shares in your company to him, on the ground of discrepancy between your prospectus and articles of association, and inability to get a settlement or quotations on the *Stock Exchange*. This application is without prejudice to his remedy for damages for the loss he has sustained, but which he is willing to forego if the amount is returned and my costs are paid forthwith. In default of payment my client will take such proceedings as counsel may advise."

To this letter the company's then solicitors, Messrs. *Newbon, Evans, & Co.*, replied, saying that according to their view there was not the slightest ground for the application, and that the directors were quite prepared to defend themselves against proceedings.

On the 17th of July the decision of the Lords Justices in *Stewart's Case*, affirming that of Vice-Chancellor *Wood* on the 28th of June, was given (1); and on the 19th of July, Mr. *Whitehouse's* solicitor, referring to his letter of the 19th of March, and to the decision in *Stewart's Case*, begged to inquire whether the company intended to comply with his client's demands, and in the alternative threatened proceedings.

On the 21st of July the secretary of the company wrote to Mr. *Whitehouse's* solicitor, announcing a change in the company's solicitors. On the 31st, Mr. *Whitehouse's* solicitor wrote to the secretary to say he had not heard from the new solicitors as promised, upon which the secretary wrote, on the 1st of August, to say he

(1) Law Rep. 1 Ch. 574, 12 Jur. N.S. 755

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had sent on the letter to Messrs. *Combe & Wainwright*, the new solicitors of the company, and on the same day *Combe & Wainwright* wrote acknowledging the receipt of it, and suggesting that Mr. *Whitehouse's* case should stand over till November, as nothing could be done during the Long Vacation.

On the 30th of October, and 1st of January, 1867, printed circulars were issued by the company, the latter proposing a scheme for paying off recusant shareholders by instalments, by offering them debentures in lieu of shares.

On the 3rd of January, 1867, Mr. *Whitehouse* wrote the following letter to the secretary:—

"Sir,—I see it reported that the directors of the *Russian Iron Company* have arranged with the representatives of certain shareholders of the company to propose terms for repaying them their money. I am not one of the shareholders to represent, but I have already repudiated my liability, and have given the directors notice of such. If the directors place me on the same footing as the shareholders represented by Messrs. *Harrison & Lewis*, I shall be willing to fall in with the arrangements they make. If you will let me know by an early post whether the directors accede to these terms or not I shall be much obliged."

To this the secretary replied, on the 4th of January, that if the proposed arrangements with Messrs. *Harrison & Lewis's* client (Mr. *Stewart*) were fairly concluded, the directors would be willing to place Mr. *Whitehouse* on the same footing and to give him the option of debentures. This letter was followed by another from the secretary, on the 5th, in which he said that in his letter of the day before he should have added that any arrangement as to debentures was subject to the order of the Court being given for the removal of the name from the register. Mr. *Whitehouse*, by letter of the 10th of January, objected to the necessity of being obliged to apply to the Court, seeing that he had given notice to withdraw so long since as he had done.

On the 6th of February, 1867, Mr. *Whitehouse's* solicitor wrote to Messrs. *Rickards & Walker*, the present solicitors of the company, saying that he had been instructed that it had been arranged that Mr. *Whitehouse* should have a debenture instead of the money,

but that Mr. *Whitehouse* must get his name removed from the list of shareholders by an order of the Court, adding, "I presume that you are instructed to consent to the application."

No reply was sent to this, and the notice of motion was dated the 16th of February.

By an affidavit filed on the 15th of February, *Whitehouse* said that previously to the 19th of March, 1866, he had never seen or read, or heard read, the memorandum or articles, and that he never consented or agreed, or intended to consent or agree, to become, or to be, nor had he in any way assented to be, or acquiesced in being, a shareholder in a company with the large and extensive objects which, by such discovery, he learnt that the company under its memorandum and articles had.

By an affidavit, filed since, he further said, referring to his former affidavit, he thought it proper to add, that in consequence of his hearing, in August, 1865, that the company would not get a day fixed for a settlement on the *Stock Exchange*, he wrote the letter of the 22nd of August. He added: "At this time I had not the slightest knowledge or idea of the variance I now complain of; and from what I have heard, I believe the reason of the company not being able to get a settlement day fixed on the *Stock Exchange* arose from there being some power in the articles of association of increasing the capital of the company, which the *Stock Exchange* Committee objected to at this time. This was the only variance I had heard of, and it was not until the 19th of March, 1866, that I saw the memorandum or articles of association, or in any way became aware of the variances which I now complain of."

Mr. *T. A. Roberts*, for Mr. *Whitehouse*.

Mr. *Gill*, for the company.

Mr. *Roberts*, in reply.

SIR W. PAGE WOOD, V.C.:—

I think it would be very dangerous to accede to this application.

In August, 1865, the applicant first discovered that there was a discrepancy between the articles of association and the prospectus.

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He laid hold of that, and said he intended to insist upon it. He gave notice that he retired, and requested the immediate return of his deposit. Having said that in August, 1865, he takes no further step till March, 1866, when he again demands the return of his allotment money, this time alleging a different sort of discrepancy altogether. Upon this the other side set him at defiance.

Now a man cannot, I think, allege the recent discovery of a new ground of objection as an excuse for delay, after having demanded the cancellation of his contract. The moment he is at arms' length with the company, I must take it he knows all the points of discrepancy upon which he intends to rely. I think I cannot allow him to repudiate his agreement, and then to come afterwards and say he has found out several other points of difference. He cannot say: "There were two instruments; one of them differed materially in one particular from that on which my contract was founded; I called for the cancellation of my contract on that ground; then I waived that discrepancy, relying upon its being altered, and now I again demand to be released from my contract on the ground of another discrepancy which I have just discovered."

Stewart's Case (1) was very different. He was invited to attend a meeting of directors, convened for the purpose of correcting a particular variance. He never put himself at arms' length with the company, and might well have supposed that that small discrepancy was the only one that existed, which the company were very anxious to remove, and that he had a particularly straightforward set of people to deal with.

Under these circumstances, I cannot discharge the applicant, and the motion must be refused.

Mr. *Gill* asked for the company's costs.

The VICE-CHANCELLOR said that the applicant had been misled by the company, inasmuch as their printed circular, offering debentures in lieu of shares, did not state, what they afterwards insisted on, that the offer was subject to the order of the Court for

(1) Law Rep. 1 Ch. 574, 12 Jur. N.S. 755

the removal of the shareholder's name from the register; and therefore he should give no costs.

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Solicitor for the Applicant: Mr. *John Turner*, agent for Mr. *C. B. King, Birmingham.*

Solicitors for the Company: Messrs. *Rickards & Walker.*

In re RUSSIAN (VYKSOUNSKY) IRONWORKS COMPANY.

V.-C. W. 1867 *April* 25.

TAITE'S CASE.

Company—Rectification of Register—Variance between Prospectus and Memorandum—Delay.

A., a shareholder, on the 2nd of July, 1866, gave notice to the company that, unless within three days steps were taken to remove his name from the register, he should apply to the Court. The directors on the next day (3rd of July, 1866) replied that they should oppose his application. *A.* left town without taking any further steps, and on his return, about the end of August, finding that his name was still upon the register, he stated that he should apply to the Court as soon as the Long Vacation was over:—

Held, that the delay between the 3rd of July and the beginning of the Long Vacation was fatal to *A.*'s application; although, having regard to a subsequent course of negotiations, between the 30th of October, 1866, and the 8th of March, 1867, from which he was led to suppose that the company would themselves remove his name, *A.*'s application, though refused, was refused without costs.

THIS was a motion on behalf of Mr. *W. A. Taite* that his name might be removed from the register of shareholders of the *Russian (Vyksounsky) Ironworks Company, Limited.* The circumstances of the company are stated in *Stewart's Case* (1).

Mr. *Taite*, in his affidavit, stated that on the 16th of April, 1865, having seen the prospectus of the company, he applied for 100 shares. On the 10th of May he received an allotment of fifty shares, upon which he paid the balance required upon allotment. Mr. *Taite* attended an extraordinary general meeting, held on the 13th of September (in consequence of the refusal of a settling day by the Committee of the *Stock Exchange*), but

(1) Law Rep. 1 Ch. 574, 12 Jur. N. S. 755.

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TAITE'S CASE.

took no part personally in the proceedings, and, like Mr. *Stewart*, was under the impression that the only variance between the prospectus and the memorandum and articles was that which was noticed in the circular convening the meeting (a power to increase the capital of the company to the extent of £500,000 above the nominal capital), and it was not until the end of May, 1866, when he received the report of the committee formed to inquire into the affairs of the company, that he first became aware of the variance between the prospectus and the memorandum and articles.

On the 2nd of July, 1866, Mr. *Taite*, who, with other shareholders in the same position, had waited for the result of *Stewart's Case* (1) (which had been put forward as a testing case, and was decided by the Vice-Chancellor on the 28th of June), served the company with a notice that, having recently discovered that the company was registered with a memorandum and articles of association with more extensive and different objects to those stated in the prospectus, he repudiated his fifty shares, and required a return of the £5 per share paid by him, and that unless within three days steps were taken by the company to remove his name from the register he should himself apply to the Court.

In reply to this notice Mr. *Taite* received the following letter, dated the 3rd of July, 1866, from the secretary of the company:—

"I am instructed to state, in reply to your requisition to have your name removed from the register of members, that the directors are advised by counsel that there is no such variance between the prospectus and the memorandum and binding provisions of the articles of association of this company as will entitle a shareholder to repudiate or reject the shares allotted to him, and to have his name removed from the register; and that it is their duty, acting in the interest of the shareholders generally, to resist any application that may be made to the Court of Chancery for the above purpose, and the directors will oppose any such application accordingly."

Mr. *Taite* left *London* shortly afterwards, and on his return, towards the end of August, 1866 (*Stewart's Case* having been affirmed on the 17th of July), he called at the offices of the com-

(1) Law Rep. 1 Ch. 574, 12 Jur. N.S. 755

pany to inquire if his name was still upon the register, and on being informed that it was, replied that as soon as the Long Vacation was over he should apply to the Court to have his name removed, and for a return of his deposit. On the 30th of October, 1866, *Taite* received from the company a circular, in which the directors stated that they were appealing to the House of Lords against the decision in *Stewart's Case* (1), and offered to treat the ultimate decision in that case as conclusive so far as regarded all those coming within it, and who should give notice to the company on or before the 15th of November of their desire to be removed from the register. Trusting in the *bona fides* of this offer, *Taite*, previously to the 15th of November, wrote to the secretary acceding to it.

Some further correspondence took place in December, 1866, and January and February, 1867, and Mr. *Taite's* right to removal from the register was not disputed—on the contrary, it was proposed that the application to the Court for rectification of the register should be made by the solicitors of the company "to save expense,"—until the 8th of March, when Mr. *Taite* received a letter from the secretary referring to the recent decision in *Whitehouse's Case* (2), on the 28th of February, and stating:—

"The company are desirous to keep faith in every respect with all shareholders equally, and are ready to allow Messrs. *Combe* and *Wainwright*, solicitors, pursuant to the correspondence, to proceed in an application to the Court to have your name removed from the list of shareholders, but they think it right that you should clearly understand that the whole facts will be brought before the Court when the application comes on, by Messrs. *Rickards* and *Walker*, as solicitors for the company, and of course in the interests of all the shareholders, and it will be for the Court to say whether your case differs from *Whitehouse's*, whose name the Vice-Chancellor has refused to remove from the list."

In a subsequent letter, of the 13th of March, Mr. *Taite* was reminded that the proposed arrangement of the company (contained in the circular and previous correspondence) referred to those shareholders who might come within *Stewart's Case*, and that the

(1) Law Rep. 1 Ch. 574; 12 Jur. N.S. 755. (2) *Ante*, p. 790.

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directors considered that the circumstances of each case must be stated in order that the Court might decide whether the application came within *Stewart's Case* or otherwise.

Under these circumstances Mr. *Taite* moved that his name might be removed from the register of members, on the ground of the material variance between the objects of the company as stated in the prospectus, on the faith of which the shares were taken, and in the memorandum and articles of association under which the company was subsequently registered.

Mr. *Druce*, Q.C., and Mr. *Markham Law*, in support of the motion, insisted that his case fell exactly within *Stewart's Case* (1).

Mr. *Gill*, for the company, was heard upon the question of costs only.

SIR W. PAGE WOOD, V.C. :—

I must adhere to the view which I took in *Stewart's Case;* but the present differs from that case in this important particular, that whereas Mr. *Stewart* applied to have his name removed the very next day after he became aware of the contents of the memorandum and articles of association, Mr. *Taite*, after giving the company notice, on the 2nd of July, that he should apply to have his name removed, and receiving, on the 3rd of July, the answer that the directors would oppose his application, waited for a whole month (between the 3rd of July and the beginning of the Long Vacation): possibly to see whether it would be more for his interest to proceed with his application or remain where he was. After this delay I must refuse his application, though, looking at what afterwards took place, I do not make him pay any costs.

Motion refused without costs.

Solicitors: Mr. *Richard Chandler;* Messrs. *Rickards & Walker.*

(1) Law Rep. 1 Ch. 574.

In re BLAKE'S TRUST.

V.-C. M.
1867
March 15.

Construction—Gift of Stock "after decease of"—Life Estate by Implication.

A testator gave a sum of stock in trust for a married woman for life, and after her decease, if she should leave children, upon trust for her husband for life; and after his decease, upon trust to divide the same among the children, but if no child, then upon trust, after the decease of husband and wife, to other persons absolutely.

The husband survived the wife, but there were no children:—

Held, that the husband took a life estate in the stock by implication.

THOMAS BLAKE, by his will, dated the 23rd of April, 1849, gave and bequeathed £4000 New 3¼ per Cent. Bank Annuities to three trustees, upon trust to pay the dividends and annual produce thereof to *Elizabeth S. Taylor*, wife of *William Taylor*, during her life, for her own use and benefit, independent of her husband, and without power of anticipation, "and from and after her decease, if she shall have any child or children, upon trust to pay the same dividends and annual produce to her husband, *William Taylor*, if he shall survive his said wife, during his life; and from and after his decease, upon trust to transfer and divide the said sum of £4000, New 3¼, late 3½, per Cent. Bank Annuities, unto and equally between all and every the child and children of the said *Elizabeth S. Taylor* who shall attain the age of twenty-one years or marry, for his or their absolute use and benefit, in equal shares; and in case the said *E. S. Taylor* shall have no child who shall acquire a vested interest in the said sum of £4000 New 3¼, late 3½, per Cent. Bank Annuities, under the trusts aforesaid, then I direct that my trustees shall stand possessed thereof, and of the income arising therefrom, after the decease of the said *William Taylor*, and *E. S. Taylor* his wife, as to one moiety thereof upon trust for my nephew, *William John Blake*, his executors, administrators, and assigns, absolutely, and as to the other moiety thereof, upon trust for *Ann Bayspoole*, the wife of *Robert Bayspoole*, her executors, administrators, and assigns absolutely."

Elizabeth S. Taylor died in October, 1866, without ever having had a child, leaving her husband, *William Taylor*, surviving her.

V.-C. M. 1867 ~~ *In re* BLAKE'S TRUST.

William Taylor having claimed to have a life interest in the £4000, the trustees paid it into Court, under the *Trustee Relief Act;* and *William John Blake* and *Ann Bayspoole* presented the present Petition for payment of the fund out to them in moieties.

Mr. *Boyle,* in support of the Petition, asked for the immediate payment out of the stock to the Petitioners.

Mr. *Rendall,* for Mr. *Taylor,* the husband:—

The husband clearly takes a life estate by implication in the stock, it being given over after his decease. In *Blackwell* v. *Bull* (1), where similar words occurred, a life estate was given in real, as well as personal, estate, though more difficulty occurs in the case of real estate; and a strong probable implication is sufficient: *Doe* v. *Summerset* (2). [He also referred to *Bird* v. *Hunsdon* (3); *Cockshott* v. *Cockshott* (4); *Townley* v. *Bolton* (5).]

Mr. *Boyle,* in reply:—

None of the cases cited at all bear on the present, there being no other part of the will in any of them inconsistent with the implication of a life estate. In *Bird* v. *Hunsdon,* there was a clear indication of the testator's intention to provide maintenance, and that was quite consistent with the implication.

But in the present case, the testator intended that if Mrs. *Taylor* left a child her husband should have a life estate, but if there was no child he should not; and accordingly, in the one case, the testator has given him such life estate, while in the other he has not.

Mr. *Edmund James,* for the trustees.

SIR R. MALINS, V.C.:—

I think the testator's intention clearly was, that the stock in question, after life interests in Mr. and Mrs. *Taylor,* should go to their children, if there were any; and that if there were no children, Mr. and Mrs. *Taylor* should each take life interests, and

(1) 1 Keen, 176.
(2) 5 Burr. 2608.
(3) 2 Sw. 342.
(4) 2 Coll. 432.
(5) 1 My. & K. 148.

that, subject thereto, the stock should go to the Petitioners, who were intended to be postponed till the termination of the life interest in Mr. *Taylor*, if he survived his wife.

V.-C. M. 1867 *In re* BLAKE'S TRUST.

Mr. *Taylor* must, therefore, be declared entitled to the dividends for his life.

Costs of all parties must come out of the fund.

Solicitors for the Petitioners: Messrs. *Blake & Snow.*

Solicitors for the Respondents: Messrs. *Marshall, Westall, & Roberts.*

YOUNG *v.* YOUNG.

V.-C. M. 1867 *March* 13.

Mortgagor wrongfully in Possession—Mortgagee entitled to Tack.

A testator, in 1832, devised his copyhold estate, which was subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate, and the original mortgage being transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860:—

Held, that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance.

THIS suit was instituted for the administration of the estate of *Zaccheus Young* the elder, who, by his will, dated the 25th of October, 1832, gave and bequeathed to his wife, *Elizabeth Young*, during her life, all his customary estate at *Field Head*, subject to the payment of a mortgage debt of £160, with interest, to *James Talford;* and at the decease of his wife he directed that the residue of his aforesaid property should be sold, and divided equally among his sons and daughters; and also, after payment of all his debts, he gave and bequeathed to his wife the whole rest and residue of his property, stock in trade, and everything he was possessed of, and he appointed his wife and *Robert Forester* executors of his will. *Isaac Young* was the testator's eldest son, and he had six other

V.-C. M. 1867 YOUNG v. YOUNG.

children. The legal estate was vested in *Talford* as mortgagee by customary grant and admittance.

The testator died on the 10th of December, 1832, leaving no real property except the copyhold estate at *Field Head*, and being possessed of no personal estate. The widow entered into possession of the customary lands at *Field Head* as tenant for life under the trusts of the will, and continued in possession until the year 1845, when, in company with her daughters, she emigrated to *America*, where she remained until her death, in April, 1860.

Upon the departure of the widow for *America*, her eldest son, *Isaac Young*, proposed to her that he should manage the customary lands at *Field Head* during her absence, as her agent, and he undertook to receive the rents and profits thereof, and, after payment thereout of the interest accruing due upon the mortgage of £160, to remit the surplus to her in *America*. The widow assented to this proposal, and *Isaac Young* remained in possession of the property until his death. In the year 1851, upon pretence that he was in possession of such property as the customary heir of the testator, he succeeded in inducing *William Longrigg* to advance him the sum of £90 upon the security of a further charge upon the property, and *William Longrigg* thereupon agreed to pay off the mortgage debt of £160 due to *James Talford*, and to accept a fresh security for the aggregate sum of £250, being the mortgage debt of £160, and the further advance of £90, and accordingly, by an indenture dated the 17th of June, 1851, made between *Talford*, *Z. Young*, and *Longrigg*, the estate was granted to *Longrigg* to secure £250, and *William Longrigg* was thereupon admitted tenant of the property.

Upon the widow of the testator being informed that this mortgage had been executed, and in consequence of *Isaac Young* not having remitted to her the rents of the estate, she sent to *England* a power of attorney, under which letters of administration to the testator's estate with the will annexed were granted to *Robert Mounsey*, as attorney for the benefit of the widow, the surviving executrix of the testator's will. Application was also made to *Isaac Young* for an account of the rents and profits of the estate which had been received by him, but no account was rendered,

and down to his death *Isaac Young* appropriated such rents and profits to his own use. The widow died in 1860.

Isaac Young died in April, 1864, and, by his will, gave all his real and personal estate to his wife, the Defendant, whom he appointed his sole executrix.

The Defendant claimed to be exclusively entitled to the aforesaid property, and to the beneficial interest therein in fee simple, subject to the mortgage of the 17th of June, 1851.

The bill, which was filed by the children of the testator, *Zaccheus Young*, charged that the equity of redemption of the customary lands and hereditaments passed by the will of *Zaccheus Young*, and that they ought to be sold in pursuance of the trusts of the will, and the proceeds, after payment of the mortgage debt, ought to be divided among the parties beneficially entitled thereto by virtue of the said will.

A decree had been made for a sale of the estate, and, upon taking the accounts in Chambers, the Chief Clerk certified that there was now due to *W. Longrigg* the sum of £160 and interest upon the mortgage created prior to the death of the testator, but, inasmuch as by the testator's will the estate at *Field Head* was devised to the testator's wife for life, and after her death in manner therein mentioned, and did not descend to *Isaac Young*, as heir-at-law of the testator, he disallowed the sum of £90 as an incumbrance on the estate.

William Longrigg stated in his affidavit, that when he advanced to *Isaac Young*, on the 17th of June, 1851, the £90, part of the consideration money mentioned in the indenture of that date, he had no notice, and was not aware of the existence, of any will of *Zaccheus Young*, the testator. The said *Isaac Young* was in possession of the customary estate at *Field Head*, and always represented to the deponent that the estate descended to him as his father's eldest son and customary heir. He never mentioned to the deponent that *Zaccheus Young* had left any will, and he had advanced to him the £90 in perfect ignorance of the existence of the will, and in the belief that *Isaac Young* was the owner of the estate.

The question was now raised upon an adjourned summons, whether *W. Longrigg* should be allowed an incumbrancer upon

V.-C. M. 1867 YOUNG v. YOUNG.

the customary estate of *Field Head* for the sum of £90, together with interest due thereon, in addition to the sum of £160 and interest allowed by the certificate of the Chief Clerk.

Mr. *Mounsey*, for *W. Longrigg*:—

It was impossible for Mr. *Longrigg*, when he made the further advance upon the property, to discover that *Isaac Young* was not in possession as the customary heir of *Zaccheus Young*, his father, as he represented himself to be. The will was not proved, although nineteen years had elapsed since the death of the testator. Mr. *Longrigg* advanced the money in the full belief that he was the heir, and he is in the position of a purchaser for valuable consideration, and, having the legal estate, he is entitled to tack his second mortgage.

Jones v. *Powles* (1) is a direct authority in support of the mortgagee's claim, and that case was approved of in *Carter* v. *Carter* (2), where the decision was to the same effect.

Mr. *Shebbeare*, for the Plaintiffs:—

There was no obligation on the part of the widow to prove the will of her husband, as it only related to real estate, and there was no personal estate left by the testator. *Isaac Young* was in possession solely as agent for the widow. He managed the estate for her, and remitted the proceeds to her. She emigrated to *America* with the rest of her family, and could not know that her son would take upon himself the position of heir-at-law and mortgage the property. There was no laches on her part. It was not till after the death of the widow that the title of the children accrued. They were at any rate innocent of any laches, since they could take no step in the matter until the death of the widow in 1860.

SIR R. MALINS, V.C.:—

At the time the testator executed this will the mortgagee had the legal estate in the copyholds. The testator died in 1832, and devised this estate to his wife and children, but the will was not proved, and was not entered upon the court rolls. The widow

(1) 3 My. & K. 581. (2) 3 K. & J. 617, 638, 4 Jun 1863

having taken possession, went, in the year 1845, to *America* with some of her family, leaving the heir-at-law in possession of the estate. In 1851 Mr. *Longrigg* took a transfer of the legal estate, and was admitted, and made a further advance of £90. The question then is, whether he is entitled to tack that £90 to the original mortgage. I take it to be a settled rule that when a mortgagee has the legal estate, and makes a further advance, and has no notice of any claim adverse to his title, being a purchaser for valuable consideration, he is entitled to tack the further advance to the original mortgage.

Here the heir-at-law was in possession, and seems to have represented that he was in possession as heir, which is equivalent to a representation that there was no will, and, being in such possession, he applies for a further advance. The will was not proved, and there was no entry of it on the court rolls, consequently there can be no negligence attributable to Mr. *Longrigg*, and I must consider that he has all the rights that a purchaser for valuable consideration would have. The case of *Jones* v. *Powles* (1) is a very strong one. In that case the Plaintiff, from whom the mortgagee acquired his title, had no title whatever, except possession, the only apparent title being under a forged will. It was there laid down that any person who is a purchaser for valuable consideration may protect himself by the legal estate, and this applied to a mortgagee who had been induced to lend his money upon a false representation of facts. That decision was approved of by Sir *W. Page Wood* in the case of *Carter* v. *Carter* (2).

Those cases go beyond what is here wanted; therefore, upon authority as well as upon principle, I must decide that the mortgagee has a right to tack his second mortgage, and his legal estate must be protected against the rights of the children.

Mr. *Longrigg* will have his costs in Chambers, and his costs of this application. The Plaintiffs' costs will be costs in the cause.

Solicitors for all parties: Messrs. *Gray, Johnston, & Mounsey.*

(1) 3 My. & K. 581. (2) 3 K. & J. 617, 638; 4 Jur. N.S. 63.

V.-C. S.
1867
Feb. 25, 26.

CHILD *v.* MANN.

Interpleader by Sheriff—Bankruptcy of Debtor—Sale of Goods by Sheriff after Notice of Bankruptcy.

10 Ch D. 376

Sheriff in possession of goods under a writ of *fi. fa.* being served with notice of an adjudication in bankruptcy against the debtor, and notice by the assignee to quit possession, the execution creditor obtains an order requiring the sheriff to make a return to the writ. The sheriff then sells the goods:—

Held, that the sheriff was entitled to file a bill of interpleader against the assignee and the execution creditor; and that the assignee was, on interpleader, entitled to the proceeds of the sale.

MOTION for a decree. On the 6th of July, 1865, an order was made in the cause of *Fortescue* v. *Mann*, directing that certain costs should be paid by the Plaintiff to the Defendant therein. Those costs were afterwards taxed at £72 4*s.* 2*d.* On the 10th of November, 1865, the Defendant *Mann* sued out of this Court a writ of *fi. fa.* against the goods of the Plaintiff *Fortescue*, and lodged it with the Plaintiff *Child*, who was at that time sheriff of *Staffordshire*, and he issued his warrant for levying for the above amount and interest at £4 per cent. from the 7th of November, 1865.

On the 11th of November, 1865, the goods were seized, and shortly afterwards advertised for sale by auction.

On the 15th of November, the Plaintiff *Child* was served with notice that *Fortescue* was, on the previous day, at the *Rugeley* County Court, adjudicated bankrupt, and that he must not remove or sell the goods seized.

On the 17th of November, the Plaintiff *Child* was served with another notice that *Fortescue* had that day, at the *Birmingham* District Court, been adjudicated bankrupt, and that he must abandon the possession of the goods.

On the 18th of November, 1865, *James Gardner*, the Registrar of the *Rugeley* County Court, was appointed official assignee, and on that day he gave notice to the Plaintiff *Child* that all dealings by him with the goods would be at his peril, and required him to pay all moneys of the bankrupt to him.

James Gardner was originally made a Defendant to the bill, but he was afterwards, on the motion of the Plaintiff, dismissed.

The validity of the adjudication of the County Court was disputed by *George Kinnear*, who was appointed official assignee by the *Birmingham* District Court.

George Kinnear was originally made a Defendant to the bill, but he also was afterwards, on the motion of the Plaintiff, dismissed.

On the 22nd of November, the Plaintiff *Child* was served with an order made the previous day in the cause of *Fortescue* v. *Mann*, requiring him to make a return to the writ of *fi. fa.* On the 25th of November, 1865, the Plaintiff *Child* sold the goods for £81 4*s.* 10*d.*, and there remained in his hands, after deducting certain charges amounting to £23 8*s.* 9*d.*, the balance of £57 16*s.* 1*d.*

This bill was filed by *Child* on the 11th of December, 1865, alleging that the Defendants *Mann*, *Gardner*, and *Kinnear*, claimed the moneys in his hands, and that all of them threatened proceedings to recover the same; and praying that he might be at liberty to pay the moneys into Court to the credit of the cause *Fortescue* v. *Mann*, and that the Defendants might interplead. The bill also prayed for injunctions, and for costs.

On the 17th of July, 1866, the bill was amended, by stating that the adjudication by the County Court had been annulled, and that *George Myatt*, then made a Defendant, had been appointed creditors' assignee under the adjudication by the *Birmingham* District Court, and by striking out the names of the Defendants *Gardner* and *Kinnear*, and inserting in their stead the name of *Myatt*.

Mr. *Fischer*, for the Plaintiff, submitted that this was a proper case for a bill of interpleader by the sheriff: *Hale* v. *Saloon Omnibus Company* (1); *Tufton* v. *Harding* (2).

Mr. *Ince*, for the Defendant *Myatt*:—

This bill ought not to have been filed at all. In *Hale* v. *Saloon Omnibus Company* there were equities between the parties which made a bill necessary. Where the question is a legal one, a Court

(1) 4 Drew. 492. (2) 6 Jur. (N. S.) 116.

V.-C. S. 1867 CHILD v. MANN.

of common law ought to be resorted to, under the 1 & 2 Will. 4, c. 58, s. 6, which enables sheriffs who have levied, and where claims are made by assignees in bankruptcy and other persons, to proceed in a cheap and summary manner. There is no question to be decided here, but if there were, the sheriff ought to have proceeded under that Act. In *Slingsby* v. *Boulton* (1), a sheriff levied upon goods alleged to be in settlement, and a bill of interpleader could not be maintained. This is a similar case. The sheriff, after receiving notice of the bankruptcy, ought not to have stirred one step, for his power to sell the goods was taken away from him. The law is clearly laid down in *Crawshay* v. *Thornton* (2). If a creditor issues a *fi. fa.*, and sells the goods, he is not entitled to the proceeds unless the sale takes place before the filing of a petition for adjudication: 12 & 13 Vict. c. 106; *Hutton* v. *Cooper* (3); and the same principle was followed in *Young* v. *Roebuck* (4), where it was held that seizure by a sheriff under a *fi. fa.* is not valid as against assignees, unless it has been perfected by a sale of the goods before the filing of such a petition. The sheriff has been a wrongdoer, for long before the sale of *Fortescue's* goods he had notice that there had been an adjudication in bankruptcy, which gave the assignee a paramount right to the property, and the bill ought to be dismissed with costs.

No one appeared for the Defendant *Mann*.

SIR JOHN STUART, V.C.:—

This bill comes within the definition of interpleader stated by Lord *Cottenham* in *Crawshay* v. *Thornton*, where he said: "In equity it is defined to be where two or more persons claim the same debt or duty." Each of the Defendants, *Mann* and *Myatt*, claims the fund, and the sheriff is merely a stakeholder. His fees have been paid, and the balance of the proceeds of the sale has been paid into Court. The question is, to which of the Defendants does this fund belong? Lord *Cottenham*, in *Crawshay* v. *Thornton*, also said, that "the case tendered by every bill of interpleader ought to be, that the whole of the rights claimed by the Defen-

(1) 1 V. & B. 334.
(2) 2 My. & Cr. 1.
(3) 6 Ex. 159.
(4) 2 H. & C. 296.

dants may be properly determined by litigation between them, and that the Plaintiff is not under any liabilities to either of the Defendants beyond those which arise from the title to the property in contest."

It was contended that at law the right of the assignee in bankruptcy is quite clear, and authorities have been cited to shew that where goods have been seized, but have not been sold before the adjudication, the assignees are entitled. But it must be remembered that the sheriff here acted under a peremptory order of this Court to make a return to the writ of *fi. fa.* The sheriff complied with that order, and then he filed this bill of interpleader, because there were conflicting claims made against him. There must be a decree that the Defendants do interplead. The sheriff having done his duty, his costs must be taxed and paid out of the fund, and if it should be insufficient, then order that the Defendants *Mann* and *Myatt* do pay the deficiency, but if more than sufficient, the Defendant *Myatt* to have the surplus of the fund, and be paid his costs and the costs that he may have to pay to the Plaintiff by the Defendant *Mann*.

Solicitors: Messrs. *Thomas White & Sons*, agents for Mr. *R. W. Hand, Stafford;* Mr. *Doyle*, agent for Mr. *Flint, Uttoxeter.*

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ABANDONMENT OF EASEMENT—*Pollution of River—Additional Nuisance—Sale of Land on Bank of a Stream—Destruction of Vendor's Easement.*] It is no answer to a Plaintiff complaining of a private nuisance to say that a great many other persons are committing the same sort of nuisance, and that the Plaintiff has admitted the fact by buying up the rights of some who have acquired rights against him; provided that a definite amount of injury can be clearly traced to the Defendant.

Mere non-user, for less than twenty years, of a privilege or easement to discharge foul dye-water into a stream is not in itself a proof of abandonment, which is a conclusion to be drawn from all the circumstances; amongst which the lying by, and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for twenty years, would destroy the easement, is a fact of great importance.

Actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement.

Circumstances under which the Court, on the whole, held that an abandonment had taken place.

A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river, *ad medium filum aquæ*.

A riparian owner, having a right to discharge foul water into the stream, if he sells land on the bank of the river, cannot claim a right (unless it be reserved in the conveyance) to continue to pour refuse into the water in front of the land sold, even though the water be not in actual use by the purchaser—not necessarily because the purchaser is the owner of half the bed of the river, but because every riparian owner has a right to use the water in its natural state, whenever he pleases, free from such obstructions to the flow as, if continued for twenty years, would become rights privileged by prescription.

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ACCRETIONS OF CHARITY FUND, *Application of — Charitable Bequests.*] A testator, in the year 1640, left real estate upon trust to pay £50 per annum to four charitable objects, namely, £20 for the

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salary of a schoolmaster, £20 to a college for the purchase of books, and two sums of £5 to the poor of two parishes, with a direction that any deficiency should be borne rateably. The funds of the charity having increased in the lapse of time, an information was filed for a scheme for the application of the accretions:—

Held, that the rule was to apportion the accretions to charitable funds between the different objects of the charity *pro rata*, subject to the discretion of the Court in special cases. That the salary of a schoolmaster and the purchase of books were both objects equally deserving to be increased; but the gifts for the benefit of the poor being objectionable on principle, the Court would exercise its discretion in refusing to augment those bequests.

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ADMINISTRATION DUTY—55 *Geo.* 3, *c.* 184—*Contingent Interests.*] Administration duty must be paid on the whole personal estate belonging to an intestate, including contingent interests; and where such duty was not paid on a contingent interest, which afterwards fell into possession:—

Held, that administration duty must be paid on the present value of the absolute interest, and not on the value of the contingent interest at the date of administration only; although if duty had then been paid on the value of the contingency, the Crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession.

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See COPYRIGHT.

ANNUITY *for joint Lives or Life of Survivor—Will—Tenancy in common.*] Bequest of an annuity to be equally divided to and between *A.* and *B.* for and during their joint natural lives, or the life of the survivor or longer liver of them respectively:—

Held, that *A.* and *B.* took as tenants in common, and that there was no survivorship between them; and, therefore, the share of one dying went to his representative.

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APPOINTMENTS, *Whether Cumulative or Substitutionary—Election.*] Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, and the person in whose favour the appointments are made will be compelled to elect between them.

A person having a power of appointment, by deed or will, over a fund, in favour of his children, upon the occasion of the marriage of one of his daughters, Mrs. *E.*, appointed one-seventh to her; and upon the marriage of another of his daughters, Mrs. *L.*, appointed another one-seventh to her. He afterwards executed a deed-poll, by which,

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without noticing the previous appointments, he gave one sixth of the fund to Mrs. *E.*, another sixth to Mrs. *L.*, three other sixths to other children; and left one-sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children:—

Held, that the appointments to Mrs. *E.* and Mrs. *L.*, made by the deed-poll, were in substitution for those previously made, and raised a case of election; and that the will operated as an appointment of so much of the fund as was not disposed of by the deed-poll.

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APPORTIONMENT—4 & 5 *Will.* 4, *c.* 22—*Lands Clauses Consolidation Act—Lands under Lease taken by Company.*] Where lands, subject to a settlement made before the *Apportionment Act* (4 & 5 Will. 4 c. 22), are taken by a company under the *Lands Clauses Consolidation Act*, and the dividends ordered to be paid to the tenant in possession, the *Apportionment Act* does not apply to the dividends, whatever may have been the nature and date of the leases under which the lands were held by the tenants.

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2. ————————, 4 & 5 *Will.* 4, *c.* 22—"*Let into Possession.*"] A testator gave the residue of his real and personal estate to trustees, upon trust to receive and accumulate the rents and profits till his nephew should attain twenty-one, when he was to be put into possession of the estate for his life:—

Held, that there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one.

St. Aubyn v. *St. Aubyn* (1 Dr. & Sm. 611) followed.

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AUTHORITY TO PAY—Held an assignment under a forfeiture clause .. 404
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AWARD, Enlargement of time for 261
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BANKRUPTCY, Sale by sheriff after 806
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————————, Revivor for costs after Plaintiff's 473
See REVIVOR FOR COSTS ONLY.

BARONY, Gift by will following limitations of 474
See EXECUTORY DEVISE.

BENEFIT BUILDING SOCIETY—*Mortgage—Stamp Duty*—10 *Geo.* 4, *c.* 56—6 & 7 *Will.* 4, *c.* 32.] Mortgages to benefit building societies,

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by persons who are not members, are exempted from stamp duty by 6 & 7 Will. 4, c. 32, according to which Act all the exemptions in favour of friendly societies, contained in 10 Geo. 4, c. 56, are extended to benefit building societies.

THORN *v.* CROFT 193

BILL TO PERPETUATE TESTIMONY during pendency of suit .. 415
See TESTIMONY.

BIRMINGHAM CORPORATION ACTS 552
See BOROUGH FUND.

BISHOP, Status of colonial 1
See COLONIAL BISHOP.

BOROUGH FUND—*Local Acts—Street Improvement Rate—Municipal Corporation Mortgages Act*, 1860—*Expenses of widening Street—Out of what Fund payable.*] By a local Act, passed in 1851, certain property before vested in commissioners, was vested in the corporation of *Birmingham*. Powers were given to the council of purchasing land for the purposes of the Act, and of executing certain improvement works specified in a schedule; the expenses of the works for making new approaches to the town hall, and for enlarging and altering the existing streets, to be defrayed by a "street improvement rate," not exceeding 6*d.* in the £1, and mortgageable to the extent of £100,000; and all other expenses of carrying the Act into execution to be defrayed by a "borough improvement rate" not exceeding 2*s.* in the £1, and mortgageable to the extent of £150,000. From the street improvement rate certain classes of persons were wholly exempted, and canal and railway companies were in part exempted. Nothing therein contained was to alter any of the powers, privileges, and authorities vested in the corporation by any past or future acts in relation to municipal corporations. By another local Act, passed in 1861, certain other specified improvements were provided for, and it was declared that the expense of (amongst other things) widening and improving certain specified streets were to be defrayed out of the "street improvement rate." The *Corporation Mortgages Act*, 1860, empowers corporations generally, with the approbation of the Treasury, upon application made after due notice given, to make purchases of land for public purposes; but nothing therein contained is to "repeal, abridge, or affect," any power or authority of any body corporate or council, under any local Act.

The corporation of *Birmingham* having contracted for the purchase of land for the widening of a street (not comprised in the works specified in the local Acts of 1851 and 1861), and having (after due notice given, and after all parties interested in the scheme had been heard before a commissioner deputed by the Treasury) obtained the sanction of the Treasury to the purchase of the land, and the charging of the borough fund with the purchase-money:—

Held, upon construction of the statutes, that the corporation were lawfully empowered to raise the purchase-money out of the "borough fund."

ATTORNEY-GENERAL *v.* CORPORATION OF BIRMINGHAM 552

BREACH OF TRUST by conveyance under Church Building Acts .. 436
See CHURCH BUILDING ACTS.

BUILDING, Covenant against 515
See COVENANT AGAINST BUILDING.

BUILDING CHAPEL, Bequest for 757
See CHAPEL.

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BUILDING CONTRACT, Benefit of, as between heir and next of kin .. 98
See HEIR AND NEXT OF KIN.

BUILDING PARSONAGE, Bequest for, when good 60
See PARSONAGE.

BUILDING SOCIETY, *Construction of Rules of—Redemption of Mortgages—Winding-up—Liabilities of Advanced and Unadvanced Shareholders.*] By the rules of a permanent building society, established in 1850, it was provided that the ultimate value of each share should be £120, and the monthly subscriptions on every share 10s., and that all members should continue to pay for the term of fourteen years, or till such time as all the shares of the same date should have attained the full value of £120. Provisions were made for making advances to the shareholders at the rates stated in *Jones's* tables. It was then provided that if any shareholder, having executed a mortgage to the society for money advanced, should be desirous to pay off or satisfy the same, he should be at liberty to do so by paying to the directors, at once, a fine of 10s. per share, together with all the subscriptions that would become due on the share or shares so advanced, up to the end of fourteen years from the date or commencement of the same; and in consideration of such prompt payment, discount at 5 per cent., according to *Jones's* tables, should be allowed. By another rule, it was provided that the holders of advanced shares, on which subscriptions had been paid for fourteen years, or when the amount so paid should equal the sums advanced, with the interest and other charges thereon, should be entitled to a full and complete release from the mortgage given for securing the same, according to the provisions of the former rule, "and at once cease to be members."

The mortgages executed by the advanced shareholders under the above rules contained provisoes for redemption on regular payment of all subscriptions, and other payments which should become due to the society by virtue of the rules and regulations, and upon observance and compliance, in other respects, with the rules and regulations; and covenants on the part of the mortgagor to pay all subscriptions, fines, penalties, and other payments, which should from time to time become due and payable to the society in respect of the share, according to the rules and regulations for the time being.

Losses having been incurred through the fraud of a secretary, the society, in March, 1865, was wound up. The advanced shareholders were placed, and (notwithstanding opposition) settled on the list of contributories, and, by a subsequent order, the advanced shareholders were empowered to redeem their shares.

All debts having been paid, and all the advanced shareholders having redeemed their shares, a call was made by the official liquidator upon all the shareholders, advanced and unadvanced, for the purpose of satisfying the claims of the unadvanced shareholders:—

Held, that the advanced shareholders were not liable to contribute to the call: on the ground that, upon redemption of their shares, they had, under the rules, "ceased to be members" of the society.

In re DONCASTER PERMANENT BUILDING SOCIETY 158

2. ——————, *Reasonable Fine—Penalty—Mortgage—6 & 7 Will. 4, c. 32, s. 1.*] The rules of a benefit building society empowered the society to advance to its members the amount of their shares, repayable by monthly contributions covering principal and interest, and imposed fines for non-payment of the contributions at the rate of a shilling per pound per month:—

Held, that the fines were reasonable within the meaning of the 1st section of 6 & 7 Will. 4, c. 32, and were not within the doctrine of equitable relief against penalties, but that they did not carry interest;

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and that a borrowing member could not redeem a mortgage to the society without paying the fines which he had incurred.
PARKER *v.* BUTCHER 762

3. BUILDING SOCIETY—Exemption from stamp duty 193
See BENEFIT BUILDING SOCIETY.

BURIAL GROUND—*Appropriation of Burial Fees to charitable Purposes—Closing of Burial-ground—Purchase by Railway Company—Claims by Church Trustees, Vicar, Incumbent, and Vestry—Lands Clauses Act, ss.* 69, 79—*Jurisdiction—Scheme refused.*] By a local Act of 1792, land was directed to be purchased for an additional burial-ground of a parish, and it was provided that the land, when purchased, was to vest in the vicar and churchwardens of the parish and their successors, for the purpose of a burying-ground for the use of the parish for ever. The fees were to be received by the churchwardens, and accounted for to the trustees. In 1816, a body was constituted called the church trustees, consisting of the vicar, churchwardens, and other parishioners; and by a statute in 1821, the Act of 1792 was repealed, except that the additional burying-ground purchased under that Act was to remain vested in the vicar and churchwardens and their successors, for ever, for the use of the parish. The church trustees were to fix the amount of the burial fees, which were to be received by the churchwardens, and when they amounted to £200, were to be paid over to the church trustees, who were to apply them to certain defined charitable purposes. Afterwards, by an Order in Council, the additional burial-ground was closed for the purposes of burial; but the church trustees continued to receive burial fees for interments in a new cemetery which had been provided. A railway company having taken part of the additional burial-ground, the church trustees petitioned the Court, under the Railway Acts, that the purchase-moneys might be invested to their account and the dividends paid to them:—
Held, that the Court had no jurisdiction under the Railway Acts to make the order as prayed:
Upon a second Petition being presented by the Attorney-General for a scheme:—
Held, upon the two Petitions, that the Court had jurisdiction; that the Petitioners' rights were not extinguished, but only suspended, and that they were entitled to the order as prayed.
In re ST. PANCRAS BURIAL-GROUND 173

CAIRNS' ACT—Damages instead of injunction 330
See DAMAGES.

CHANCERY AMENDMENT ACT, Sale before decree under 574
See SALE BEFORE DECREE.

CHAPEL, *Bequest towards the erection of—Will—Charity—Mortmain.*] A bequest to the trustees of a particular chapel in *C.*, to be applied towards the erection of a new chapel in *C.*:—
Held valid, where there was land, duly vested in the trustees at the date of the will, on which a new chapel could be built in substitution for the old one.
BOOTH *v.* CARTER 757

CHAPEL OF CHARITY, Effect of Order in Council assigning district to 436
See CHURCH BUILDING ACTS

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CHARGING ORDER, Forfeiture by 759
See FORFEITURE. 2.

CHARITY—Application of accretions 424
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———, Burial fees appropriated to 173
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———, Bequest for building chapel 757
See CHAPEL.

———, Bequest for building parsonage 60
See PARSONAGE.

———, Secret trust for 635
See SECRET TRUST.

CHARITY CHAPEL, Effect of Order in Council assigning district to .. 436
See CHURCH BUILDING ACTS.

CHURCH BUILDING ACTS (58 *Geo.* 3, *c.* 45, 59 *Geo.* 3, *c.* 134, *and* 3 *Geo.* 4, *c.* 72)—*Conveyance by Trustee of a Charity to Church Building Commissioners—Consecration of Chapel as a Parish Church—Assignment of District by Order in Council.*] The trustee of a charity is not authorized by the Church Building Acts to convey to the Commissioners the private chapel of a charitable foundation held by him as a trustee for the benefit of the charity.

Such a conveyance was declared to be a breach of trust, and a re-conveyance ordered, although the Commissioners had caused the chapel to be consecrated as a parish church, and had caused the parson who was chaplain of the charity to be appointed the incumbent, as of a parish church, and caused a district to be assigned to it as a parish church under an Order in Council.

The acts of public functionaries who exceed the bounds of their authority, by assuming a power over property which the law does not give them, whether they be a corporation or individuals, are treated as the acts of private persons dealing with property without legal authority.

ATTORNEY-GENERAL *v.* BISHOP OF MANCHESTER 436

COERCIVE JURISDICTION of colonial bishops 1
See COLONIAL BISHOP.

COLONIAL BISHOP, *Status of—Letters-patent—Coercive Jurisdiction—Endowment—Trustee and Cestui que Trust.*] Funds were subscribed and vested in trustees in *England* for the creation and endowment of a bishop of the United Church of *England* and *Ireland* in *Natal*—a colony having an independent Legislature,—and the Crown, on the application of the trustees, appointed the Plaintiff bishop of the see or diocese of *Natal* by letters-patent purporting to give him coercive jurisdiction over his clergy, and to make him subject to the Bishop of *Cape Town* as his metropolitan. The Plaintiff was consecrated in 1853. A suit was instituted by the Plaintiff to obtain payment of the income of the endowment. The trustees alleged by their answer that the effect of the judgment of the Judicial Committee *In re Bishop of Natal* (3 Moo. P. C. (N. S.) 115) was that, inasmuch as no coercive jurisdiction could be given to a bishop in a colony possessed of an independent Legislature, the letters-patent had failed to create a legal see or diocese, and thus the objects of the subscribers had *failed*:—

Held, that the Plaintiff retained his legal *status* as Bishop of *Natal* notwithstanding the said judgment; that though the letters-patent had failed to confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil Courts; and that, as no allegation was raised in the pleadings against

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the Plaintiff's character or doctrine, he was entitled to the income of the endowment.

Semble, if the Defendants had raised a case of false or erroneous teaching against the Plaintiff, the Court would either have suspended its judgment until after the result of proceedings by *scire facias* to repeal the letters-patent, or by petition to the Sovereign in Council; or else have itself decided the question in the present suit.

The effect of the judgments in *Long* v. *Bishop of Cape Town* (1 Moo. P. C. (N. S.) 411), and *In re Bishop of Natal* (3 Moo. P. C. (N. S.) 115), on the church in the colonies and the *status* of colonial bishops, considered.

BISHOP OF NATAL *v.* GLADSTONE 1

COMMON LAW PROCEDURE ACT—Enlargement of time in arbitration 261
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COMPANIES ACT, 1862—Winding up of building society 158
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——— Security for costs by company 200
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——— Set-off after winding-up 337
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——— Variance between prospectus and memorandum 790, 795
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——— Voluntary winding-up order after dissolution of company 69
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——— Winding-up order on ground of fraud 355
See WINDING-UP ORDER.

——— Practice as to summoning witness 203
See WITNESS UNDER WINDING-UP.

COMPANIES CLAUSES ACT—Execution by debenture holder .. 541
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COMPANY, lands taken by—Apportionment of dividends on interim investment 469
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——— Winding up of building society 158
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——— Burial ground taken by 173
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——— Execution by debenture holder against 541
See DEBENTURE HOLDERS.

——— Powers of discount 139
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———— Misrepresentation in prospectus 122, 520

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———— Salary after winding-up of 341
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———— Security for costs by 200
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COMPROMISE, Married woman relieved from 696
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CONTRACT, Building, benefit of, as between heir and next of kin .. 98
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CONTRIBUTORY—Winding-up of building society 158
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———— Forfeiture of shares set up by lapse of time 769
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————, Trustee for company 361
See TRUSTEE FOR COMPANY.

CONVERSION, By building contract 98
See HEIR AND NEXT OF KIN.

COPYRIGHT—*Statistical Returns—Animus Furandi.*] *A.*, being clerk and registrar of the *London Coal Market*, was in the habit of publishing, under the authority of the Corporation, at a considerable profit to himself, statistical returns, extracted from the Corporation books of which he had the custody, of all coal imported into *London*;

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such returns being published annually in sheets, and supplied to subscribers at a cost of £3 3*s.* per annum.

In a work published under the authority of the Lords of the Treasury, giving the mineral statistics of the *United Kingdom* during preceding years, and published at a cost of 2*s.* 6*d.*, the returns compiled and published by *A.* for the last nine years were introduced into the edition for 1866 (the source from which this information was derived being prominently acknowledged), and formed one-third of the whole of Defendant's work:—

Held, that having regard to the quantity and matter of the information which had been taken and republished without the exercise of any independent thought and labour, and the prejudice to *A.* in having the sale of his work superseded by this republication in a cheap form of his labours, *A.* was entitled to an injunction.

The result, in such cases, is the true test of the act, and full acknowledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator where the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work.

SCOTT *v.* STANFORD 718

CORPORATE PLAINTIFF—*Interrogatories for Examination of Officers —15 & 16 Vict. c. 86, s. 19.*] Where a company or corporation is Plaintiff in a suit, the Defendant cannot, under s. 19 of 15 & 16 Vict. c. 86, file interrogatories for the examination of its officers, when they are not parties to the suit.

IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* WHITHAM .. 89

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See FOREIGN STATE.

CORPORATION MORTGAGES ACT 552
See BOROUGH FUND.

COSTS. *See* COUNTY COURT, 1; DISCLAIMER 210, 212

———, *Under Trustee Relief Act.*] Where a trust fund has been paid into Court under the *Trustee Relief Act*, the costs of a Petition by the tenant for life for payment to him of the dividends will be payable out of the income.

In re MARNER'S TRUSTS 432

——— Certificate in patent case 308
See PATENT CASE.

———, Revivor for, by assignees 473
See REVIVOR FOR COSTS ONLY.

——— Whether set off against judgment debt 196
See SET-OFF. 1.

COUNTY COURT—*Foreclosure*—9 & 10 *Vict. c.* 95—28 & 29 *Vict. c.* 99 —*Costs.*] In a suit to foreclose a mortgage for £50, where Plaintiff and Defendant lived more than twenty miles apart:—

Held, that the jurisdiction of the Court was concurrent with that of the County Courts, and that the Plaintiff was entitled to a decree of foreclosure, with the ordinary costs.

SCOTTO *v.* HERITAGE 212

2. ——————— *Specific Performance of Lease—County Court Jurisdiction in Equity Act* (28 & 29 *Vict. c.* 99).] Agreements for leases are within the 4th clause of the 1st section of the *County Court Equity Act*, authorizing decrees for specific performance.

WILCOX *v.* MARSHALL 270

COUNTY COURT APPEAL, *Whether Sheriffs' Court subject to—County*

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Courts Equitable Jurisdiction Act (28 & 29 *Vict. c.* 99).] The Sheriffs' Court in the City of *London* is not a County Court within the meaning of the 18th section of the 28 & 29 Vict. c. 99 (the *County Courts Equitable Jurisdiction Act*), and consequently there is no appeal under the Act from the Judge of the Sheriffs' Court to the Vice-Chancellor.

HARPER *v.* POLE 752

COURT ROLLS, *Production of—Custom.*] In a suit, by a Plaintiff alleging himself to be a freehold tenant of a manor, against the lord, to establish customary rights over commons in the manor, where the Defendant, by answer, denied both the title of the Plaintiff and the alleged custom:—

Held, that the Plaintiff was entitled to production of all the Court rolls.

WARRICK *v.* QUEEN'S COLLEGE, OXFORD 683

COVENANT between purchasers against building 515
See COVENANT AGAINST BUILDING.

———— to leave residue, satisfaction of 236
See SATISFACTION.

COVENANT AGAINST BUILDING—*Covenant between Purchasers—Antecedent Breach of Covenant.*] Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; and there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the Defendant became a purchaser, and executed the deed of covenant.

PEEK *v.* MATTHEWS 515

COVENANT NOT TO ASSIGN *Lease without License—License not to be withheld "unreasonably or vexatiously"—What is an unreasonable Refusal—Specific Performance—Damages.*] Where a lease contained a covenant by the lessee not to assign without license, and the lessor covenanted not to withhold his license to assign unreasonably or vexatiously:—

Held, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing the license being, avowedly, his wish to get a surrender of the lease, for the purpose of rebuilding.

The Court decreed the lessor to concur in the assignment, and directed an inquiry to assess the damages to be awarded to the lessee for the refusal of the license to assign.

Semble, a lease being a grant of the demised property for the whole term, the lessor is not entitled to make an indirect use of any stipulation in the lease for the purpose of forcing a surrender of the term.

LEHMANN *v.* MCARTHUR 746

CROWN GRANT, *Validity of—Inhabitants—Royal Forest—Estovers.*] A grant by the Crown to the inhabitants of *L.*, which was a Crown manor and parish within a royal forest, that the labouring or poor people inhabiting the parish, and having families, might, during a certain period of every year, cut or lop the boughs and branches above seven feet from the ground, on the trees growing on the waste lands of the manor and parish of *L.*, for their own use and consumption, and

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for sale, for their own relief, to all or any of the inhabitants for their consumption within the parish as fuel:—
Held, upon demurrer, a valid grant.
WILLINGALE *v.* MAITLAND 103

CURTESY, TENANCY BY—*Exclusion of Marital Right.*] Where real estate is limited to the separate use of the wife, so as to leave to the husband no legal or equitable interest in the estate, he cannot be tenant by the curtesy.
MOORE *v.* WEBSTER 267

CUSTOM—Production of Court rolls 683
See COURT ROLLS.

CUSTOMS of uncivilized community 343
See MARRIAGE, PRESUMPTION OF.

DAMAGE, Measure of, in case of nuisance 409
See NOISE.

DAMAGES—*Light—Delay—Negotiation—Cairns' Act.*] In a case where the circumstances justified the Court in granting a mandatory injunction at the hearing, to compel the Defendants to pull down newly-erected buildings to the height of the former ones, on the ground of obstruction to the Plaintiff's light and air; but where the Plaintiff, having heard of the intended structure in April, did not complain till the November following, during which time the Defendants had laid out large sums; and where the Plaintiff had also, since bill filed, made an offer to take a money compensation for the injury to her rights:
The Court, instead of an injunction, directed an inquiry as to the amount of damages sustained by the Plaintiff.
SENIOR *v.* PAWSON 330

——— Against purchasers for infringement 308
See PATENT CASE.

——— Whether set off against judgment debt 196
See SET OFF. 1.

"DEATH," when read as "death without issue" 487
See "NEXT SURVIVING SON."

DEBENTURE HOLDERS, *Execution by, against Railway Company—Receiver—Companies Clauses Act, ss.* 42, 44.] After the appointment of a receiver of a railway undertaking, made in a suit on behalf of debenture holders, a debenture holder recovered judgment at law, and petitioned for leave to issue execution:—
Held, that the Petitioner was not entitled to issue execution otherwise than as a trustee for himself, and all other debenture holders entitled by the special Acts to be paid *pari passu* with himself; but an inquiry was directed whether it would be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making the judgment available for them.
BOWEN *v.* BRECON RAILWAY COMPANY. *Ex parte* HOWELL .. 541

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———————— Not impressed with a trust 299
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DETERIORATION of property by purchaser, ground for compelling payment into Court 171
See PAYMENT INTO COURT.

DISCHARGE, Winding-up order when notice of 341
See NOTICE OF DISCHARGE.

DISCLAIMER—*Practice—Costs.*] In a foreclosure suit, the official assignee of the mortgagor having been made a party to the suit, and served with the bill and interrogatories, wrote to say that he claimed no interest whatever in the subject matter of the suit, and that, if an answer was insisted upon, he should apply for costs against the Plaintiff. The interrogatories not having been withdrawn, the official assignee put in an answer and disclaimer, and applied at the hearing for his costs:—

Held, that as he had not been content simply to disclaim, but had put in an answer and appeared for the purpose of claiming his costs, he was not entitled to any costs.

MAXWELL *v.* WIGHTWICK 210

DISCOUNT COMPANY, *Extent of Powers of—Ultrà Vires—Concealment—Demurrer.*] Where a bill was filed by the official liquidator of a company against its late directors, stating a transaction whereby, in consideration of the payment of moneys belonging to the company by means of cheques drawn by two of the directors, certain shares in a banking company were transferred into the names of some of the directors as nominees of the company, and alleging that this transaction was *ultrà vires*, and was concealed from the company by false descriptions in the company's books:—

Held, on demurrer by one of the Defendants, that whatever might be the force of the argument as to the validity of the transaction under the company's powers, the charges in the bill as to concealment must be answered; and demurrer overruled.

JOINT STOCK DISCOUNT COMPANY *v.* BROWN 139

DISCRETION of Court as to accretions of charity fund 424
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DISTRIBUTION, Issue dying before period of 375
See GIFT, ORIGINAL OR SUBSTITUTIONAL.

DISUSER of easement 279
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———— Disuser and non-user 279
See ABANDONMENT OF EASEMENT.

———— Damages instead of injunction 330
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———— of light 465
See MANDATORY INJUNCTION.

ECCLESIASTICAL LANDS, *Contract for Sale of—Minerals*—38 *Geo.* 3, *c.* 60, 39 *Geo.* 3, *cc.* 6 *and* 21.] A contract for the sale of lands, with their appurtenances, belonging to a rectory, was entered into under the 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the *Bank of England*, as directed by the Acts, and the execution of the conveyance, the 39 Geo. 3, c. 21, was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold, should be absolutely excepted and reserved; and that the provisions of this Act should, in the execution of the former Acts, be applied as if they had been specially enacted in those Acts:—
Held, that the minerals passed to the purchaser.
WILSON *v.* GREY 117

ELECTION, Raised by substitutionary appointments 63
See APPOINTMENTS.

————, Not raised by erroneous recital 244
See MISTAKE.

———— Not to take under settlement, effect of, under forfeiture clause 236
See SATISFACTION.

ENLARGEMENT OF TIME in arbitration 261
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EQUITY OF REDEMPTION, Sale of, to mortgagee set aside 461
See SALE OF EQUITY OF REDEMPTION.

ERROR OF COURT, Correction of 218
See ORDER, SETTING ASIDE.

ESTATE TAIL divested by subsequent clause 487
See "NEXT SURVIVING SON."

EVASIVE ANSWER—*Taking Answer off the File.*] A Defendant, having several times obtained an extension of time to answer, filed at last a document stating that he was unable to answer the bill in the absence of information, for which he had sent to the continent, and which he had been unable to obtain. On motion by the Plaintiff, the document was ordered to be taken off the file, and the Defendant ordered to pay the costs of the motion, and all other costs occasioned to the Plaintiff by filing such answer.
FINANCIAL CORPORATION *v.* BRISTOL AND NORTH SOMERSET RAILWAY COMPANY 422

EVIDENCE of matrimonial customs 343
See MARRIAGE, PRESUMPTION OF.

EXCESS OF AUTHORITY by agent, whether equitable fraud 299
See VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM.

EXECUTION *after voluntary winding-up, restrained—Judgment Creditor.*] A creditor who commenced an action, and signed judgment after a resolution (of which he had notice) passed and duly con-

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firmed to wind up voluntary a limited company, restrained from issuing execution 74
In re Sablonière Hotel Company.

EXECUTION by debenture holder 541
See Debenture Holders.

EXECUTOR, Power of sale in 323
See Power of Sale in Executor.

EXECUTORS, *Liability of—Distribution of Assets under* 22 *&* 23 *Vict. c.* 35—15 *&* 16 *Vict. c.* 86, *s.* 42, *r.* 9—*Parties.*] An executor who has distributed the assets of his testator, after issuing advertisements, and taking the steps pointed out by the Act 22 & 23 Vict. c. 35, will have the same protection as if he had administered the estate under a decree of the Court; and if he should have retained any legacies as trustee, after appropriating them for the benefit of the *cestui que trusts*, he will no longer be under any liability *quâ* executor.
Clegg *v.* Rowland 368

————, Protection of by advertisement .. .. —
See Executors.

EXECUTORY DEVISE, *Settlement in pursuance of—Letters-Patent—Grant of Dignity—Revocation by Codicil—Legal Estate for Life—Estate Tail—Leaseholds and Chattels—Shifting Clause—Defeazance of Old Uses.*] Testatrix by will, dated in 1860, devised freeholds to the use of trustees and their heirs, upon trust for *E.* for life, for her separate use, without power of anticipation; and, after the death of *E.*, to the use of *C.*, the first son of *E.*, for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail male; with remainders in like form to the use of the third, fourth, and other younger sons of *E.* for life, and their respective first and other sons in tail male; remainders in tail general to the daughters of each of the above tenants for life respectively; with ultimate remainder to the use of the right heirs of the testatrix, with jointuring and other powers. She also bequeathed copyholds, leaseholds, and certain chattels to, and to the use of, the same trustees, as to the copyholds and leaseholds, "upon such trusts as would best correspond with those thereinbefore mentioned concerning" the freeholds, and, as to the chattels, to go with the mansion-house as heir-looms.

By letters-patent, dated in April, 1864, the barony of *B.* was conferred upon *E.* for life, and, after her death, upon *R.*, the second son of *E.*, and the heirs male of his body; and, in default of such issue, to the third, fourth, and fifth sons of *E.*, and the heirs male of their bodies respectively. The patent contained a shifting clause providing that, in certain events, the barony should go over.

Testatrix by a codicil dated in May, 1864, after reciting the grant of the letters-patent, and that it was her intention to settle the manors and hereditaments premises and effects, devised and bequeathed by her will, in a course of settlement "to correspond, as far as might be practicable, with the limitations of the barony," revoked the devise of the manors and hereditaments, and the gifts of the copyholds and leaseholds contained in her will, and in lieu thereof devised and bequeathed the freeholds copyholds leaseholds and said chattels, to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, and assure" the same "in a course of entail, to correspond, as nearly as might be," with the barony, in such manner and form, and with such powers, &c., as the trustees should consider proper, or as their counsel should advise:—

Held, on the question of the proper form of settlement to carry out

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the directions of the codicil, that the freeholds must follow strictly the limitations of the barony, and that

1. *E.* took a legal estate in the freeholds for life:

2. *R.* was entitled to the freeholds for an estate in tail male:

3. The leaseholds and chattels must go with the real estate, as far as practicable:

4. The shifting clause in the settlement must follow that in the letters-patent.

VISCOUNT HOLMESDALE *v.* WEST 474

FINE, in building society, what reasonable 762

See BUILDING SOCIETY. 2.

FIXTURES, *as between Tenant for Life and Remainderman—Will—Heir-looms—Tapestry—Pictures in Panels—Statues.*] A testator, who was tenant for life of settled estates, on which he had erected, fitted up, and furnished a mansion-house (an old one having fallen into decay), bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at the time of his death, and of which he had power to dispose, to be enjoyed as heir-looms by the persons who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition were not fulfilled. After the testator's death, *A.* became tenant for life of both the settled and devised estates, and on his death the settled estates devolved on *B.*; but (as the condition was not fulfilled) *C.* became entitled to the devised estates and to the heir-looms under the shifting clause in the testator's will. The question arose, as between *B.* and *C.*, which of the articles passed under the will:—

Held, that tapestry, pictures in panels, frames filled with satin, and attached to the walls; and also statues, figures, vases, and stone garden-seats, purchased and placed by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed; but that glasses and pictures not in panels, not being part of the building, passed under the testator's will:—

Held also, that articles purchased by the testator, but fixed by *A.* after his death, were not fixtures, and passed under the will to *C.*

D'EYNCOURT *v.* GREGORY 382

————, Trade, passing by mortgage 249

See TRADE FIXTURES.

FORECLOSURE 212

See COUNTY COURT. 1.

FOREIGN PATENT, *Determination of*—15 *&* 16 *Vict. c.* 83, *s.* 25—*Prior Invention and subsequent Infringement not correlative.*] A patent was taken out in *France*, in 1858, by *A.*, who, in 1861, obtained letters patent for his invention in *England*. The English patent was assigned by *A.* to *C.*, who, in January, 1865, obtained, in a suit against *E.* for infringement, a decree by which the validity of the patent was declared, and an injunction was granted to restrain infringement. In February, 1866, a judgment of *dechéance* was pronounced by the French tribunal at *Paris*, declaring the French patent, and all rights under it, determined and void from February, 1864, on the ground of non-payment by *A.* from that time of the annual duties imposed upon patentees by the French law.

Upon a motion by *C.*, in January, 1867, to commit *E.* for breach of the injunction awarded by the decree of January, 1866:—

Held (I.), that *A.*'s English patent being identical with his French

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patent, it was determined in this country (by force of 15 & 16 Vict. c. 83, s. 25) from February, 1866, the date of the annulment of the French patent by declaration of the French Court, but not sooner; and that although such declaration was in terms retrospective, yet, until actually obtained, the English patent remained in force, and there was no error calling for amendment by bill of review in the decree of this Court, by which its validity was declared in January, 1866:

Semble, that if the English patent had comprised additional matter not protected by the French patent, the determination of the French patent would only have affected that part of the English patent which was identical leaving untouched such additional matter:

Held, also, that the injunction granted in January, 1866, being only co-existent with the patent, expired when the patent was determined, and that it was open to *E.*, in answer to the motion to commit, to shew that there was no longer any order of the Court in existence which he could be said to have infringed:

Held, also, that *C.*, as assignee of the English patent, was bound by the decision of the French tribunal.

(II.) Upon the construction of the patent:

Held, that the antecedent existence of an invention, not shewn to have been brought to any successful result, and which was so far similar, that if subsequent in date to the patent it would have been held a colourable and clumsy imitation for the purpose of effecting the same result, did not invalidate the patent by anticipation:

Held, also, that although the patent included matters some of which were new and some old, it might be upheld by limiting the claim (as in *Seed* v. *Higgins* (8 H. L. C. 550) to the particular combination in the particular manner described in the specification.

DAW *v.* ELEY 496

FOREIGN STATE, *Corporate Plaintiff—Jurisdiction—Pleading—Demurrer.*] Demurrer allowed to a bill filed by "The *United States of America*" as Plaintiffs, on the ground that a foreign sovereign state is not entitled to sue in the Courts of equity in this country without putting forward some public officer as representing their interests, upon whom process may be served, and who can be called upon to give discovery upon a cross bill.

UNITED STATES OF AMERICA *v.* WAGNER 724

FOREST, Grant of estovers in royal 103

See CROWN GRANT.

FORFEITURE *of Life Interest—Debt to Bankers—Authority to Trustees to pay Income.*] Under a settlement, *O.* was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation, dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. *O.*, being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest and in reduction of the debt. It was alleged that there was an agreement with the bankers that the authority should be revocable:—

Held, that this occasioned a forfeiture of the life interest.

OLDHAM *v.* OLDHAM 404

2. ——————— *by Charging Order under the Words "suffer any Act."*] Under a settlement the dividends of the trust

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fund were payable to *B.* for his life, or until he should assign or incumber the same, *or until he should do or suffer any act* whereby the dividends should become payable to another person. A judgment creditor of *B.* obtained a charging order against the trust fund :—

Held, that under the words "shall suffer any act," a forfeiture had accrued of *B.*'s life interest.

ROFFEY *v.* BENT 759

FORFEITURE CLAUSE, Made operative by election 236
See SATISFACTION.

FORFEITURE OF SHARES—*Ultrà vires*—Effect of lapse of time .. 769
See LAPSE OF TIME.

FRAUD, Distinction between moral and technical 769
See LAPSE OF TIME.

————, Lapse of time a bar in absence of moral 769
See LAPSE OF TIME.

FRAUDULENT TRANSFER—*Shares—Purchaser for Value.*]—A broker employed by the Plaintiff to purchase shares, which the Plaintiff paid for, procured the instrument of transfer to the Plaintiff, and the Plaintiff's signature thereto, and received from the Plaintiff the certificates and transfer for the purpose of registration; soon afterwards he fraudulently procured the Plaintiff to cancel his signature to the transfer, and by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them to one of the Defendants :—

Held, that the effect of the first transfer was not destroyed by the cancellation fraudulently procured, and the registration in the name of the broker, and the transfer to his mortgagee, were decreed to be set aside.

DONALDSON *v.* GILLOT 274

GENERAL WORDS, followed by particular description 713
See IMPERFECT ENUMERATION.

GIFT AFTER DECEASE OF *A.*—Implication of life estate 799
See LIFE ESTATE BY IMPLICATION.

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Period of Distribution—Vesting.*] A testator devised certain property upon trust for his two sons, and then to sell and divide the proceeds equally among such of his five daughters as should be living at the decease of the survivor of his two sons, and the children, grandchildren, and issue, of such of his daughters as should then happen to be dead; such children, grandchildren, and issue, respectively, to take equally among them the shares which their parents would have been entitled to, had such parents been then living. *Mary*, one of the testator's daughters, whose share was now in question, died before the surviving son, having had ten children, of whom six died in her lifetime, and one other before the surviving son. One of the seven had children still living, another had a child who survived her mother, and died before the period of distribution, and the other five had no issue :—

Held, that the gift to the children of *Mary* was not substitutional, but an original and independent gift, and that it was not necessary that they should survive the period of distribution in order to take :—

Held, also, that the grandchildren of *Mary* took only the shares to which their respective parents would have been entitled, and not equal shares with the children. The fund was, therefore, divisible into tenths, each child, or his representatives, taking one-tenth.

In re ORTON'S TRUST 375

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GIFT OVER, Estate tail divested by 487
See "NEXT SURVIVING SON."

GRANT BY CROWN to a class of persons 103
See CROWN GRANT.

HEIR AND NEXT OF KIN—*Building Contract—Non-completion at Death—Conversion.*] A person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished:—

Held, that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

COOPER *v.* JARMAN 98

IMPERFECT ENUMERATION—*Will—General Words followed by particular Description.*] Testatrix, a markswoman, made a will, shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." She was possessed at her death, of property, besides cash in hand and clothes, consisting of money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash:—

Held, that the words, "consisting of money and clothes," did not cut down the generality of the gift of "personal property," being only an imperfect enumeration of the particulars of which the personal estate consisted; and that the whole of her personal estate passed by her will.

DEAN *v.* GIBSON 713

INCOME *Defeasible, Gift of, followed by Gift of Principal—Vesting.*] Bequest to the executor and a trustee, of the proceeds of a policy upon testator's life in trust so long as *A.* should not have committed any act of bankruptcy, to pay him the interest until he should attain twenty-five, so that he might not deprive himself thereof by anticipation, in which events *A.* was to lose all benefit of the provision, "my object being for the personal wants of *A.* until any of such events should have happened, and then for the good of his family." On the happening of any such event, the fund was to be in trust for the children of *A.*; but if *A.* should not then have any children, then, subject to a discretionary power in the trustees to pay *A.* any sums they might think proper, the trust moneys were to fall into the residue. The money received upon the policy was to be paid to *A.* upon his attaining twenty-five; in case he died under twenty-five, leaving any child or children, the trust moneys and interest thereof were to be in trust for the children of *A.* The will also contained a power of advancement for the benefit of *A.*

A. died under twenty-one, unmarried. He had never become bankrupt, or attempted to anticipate:—

Held, that *A.* took a vested interest in the money secured by the policy, subject to be divested in the event of bankruptcy or alienation, or of death under twenty-five leaving children, and that, as neither of these events had occurred, the interest remained absolutely vested in him.

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See NOISE.

INSURANCE COMPANY—Marshalling 668
See MARSHALLING.

INTERPLEADER BY SHERIFF—*Bankruptcy of Debtor—Sale of Goods by Sheriff after Notice of Bankruptcy.*] Sheriff in possession of goods under a writ of *fi. fa.* being served with notice of an adjudication in bankruptcy against the debtor, and notice by the assignee to quit possession, the execution creditor obtains an order requiring the sheriff to make a return to the writ. The sheriff then sells the goods:—*Held*, that the sheriff was entitled to file a bill of interpleader against the assignee and the execution creditor; and that the assignee was, on interpleader, entitled to the proceeds of the sale.
CHILD *v.* MANN 806

INTERROGATORIES—Examination of officers of corporation 89
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LANDS CLAUSES CONSOLIDATION ACT—Apportionment of dividends on interim investment 469
See APPORTIONMENT. 1.

——————————— Jurisdiction as to purchase-money of burial ground 173
See BURIAL GROUND.

LAND TAX—*Redemption*—38 *Geo.* 3, *c.* 60, *ss.* 17, 37—*Charge on Leaseholds — Settlement — General Words—Laches.*] *C.*, the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under 38 Geo. 3, c. 60, and transferred to the commissioners a sum of consols for that purpose, but did not exercise the option under sect. 17 of the Act. After the death of *C.*, *T. D.*, and *M. D.*, who were entitled in equal shares to the leaseholds under his will (which contained no reference to the land tax), and also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds, and all their "estate and interest" therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land-tax. *T. D.* died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of *M. D.*, the personal representative of *T. D.* and *M. D.* claimed, as against those entitled under the settlement, a charge in respect of the land tax:—

Held, that *C.*, on redeeming the land tax, became entitled to the interest on the consols transferred by him as a rent charge on the leaseholds for his own benefit; that it did not pass under the general words of the settlement of 1818, but remained as a separate property in the settlors, as residuary legatees of *C.*; that their representative was now entitled to it as a charge on the leaseholds; and that the fact of *T. D.* not having made any claim was no bar.

NEAME *v.* MOORSOM 91

LAPSE OF TIME—*Setting up ultrà vires act—Company—Forfeiture of Shares—Contributory.*] Lapse of time is a bar to all proceedings in equity for the purpose of undoing any transaction which is not tainted by fraud; meaning thereby an act involving great moral guilt.

An arrangement between the shareholders and directors of a company, admitted to have been originally *ultrà vires*, upheld on the ground that lapse of time prevented the transaction from being impeached, although the books of the company accessible to the shareholders did not shew the real nature of the transaction.

Brotherhood's Case (31 Beav. 365) followed.

Spackman's Case (34 L. J. (Ch.) 321), and *Stewart's Case* (Law. Rep. 1 Ch. 511), not followed.

In re AGRICULTURISTS' CATTLE INSURANCE COMPANY. SMALLCOMBE'S CASE 769

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See COVENANT NOT TO ASSIGN.

LIEN of purchaser, for deposit and costs 744
See SPECIFIC PERFORMANCE.

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LIFE ESTATE BY IMPLICATION—*Gift of Stock "after decease of."*] A testator gave a sum of stock in trust for a married woman for life, and after her decease, if she should leave children, upon trust for her husband for life; and after his decease, upon trust to divide the same among the children, but if no child, then upon trust, after the decease of husband and wife, to other persons absolutely.

The husband survived the wife, but there were no children:—

Held, that the husband took a life estate in the stock by implication.

In re BLAKE'S TRUST 799

LIGHT—Damages instead of injunction 330
See DAMAGES

———Mandatory injunction—Rule as to 45° 465
See MANDATORY INJUNCTION.

LIMITATIONS, STATUTE OF—*Mortgage—Arrears of Interest—Money payable out of Land—3 & 4 Will. 4, c. 27, s. 42.*] Where a married woman entitled, after the death of a tenant for life, to a share of a fund arising from moneys the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage by deed acknowledged, of her reversionary estate, such mortgage containing a covenant by husband and wife to pay full interest:—

Held, that the wife's estate was "money payable out of land" within the 42nd section of the 3 & 4 Will. 4, c. 27; and that the mortgagee could not recover more than six years' arrears of interest on the mortgage of such an estate.

BOWYER *v.* WOODMAN. *Ex parte* CLARKE 313

——————When time runs in respect of timber moneys 398
See TIMBER.

MAINTENANCE, *Trust or Power for—Marriage Settlement—Ability of Father.*] By a marriage settlement, the trustees were to stand possessed of £2000 (coming from the wife's father), upon trust after the decease of the wife for the children of the marriage equally, their shares to be vested at twenty-one or marriage; with a proviso, that until the principal should become payable to the children, the trustees should apply the whole, or so much of the dividends as they should think fit, for the education or maintenance of such children. The wife died, leaving one child:—

Held, that this was a discretionary trust for maintenance, and not simply a power, and that the father was entitled to have an allowance for past and future maintenance of his child, without reference to his ability to provide such maintenance; and an inquiry was directed as to the quantum to be so applied.

RANSOME *v.* BURGESS 773

MANDATORY INJUNCTION *on motion—Light—Rule as to* 45°.] The Court will not, in an ordinary case, restrain the erection of a building the height of which above an ancient light is not greater than the distance from the light.

Where, pending the litigation, the Defendant had continued the building complained of, a mandatory injunction was granted on motion.

BEADEL *v.* PERRY 465

MARITAL RIGHT, Partial exclusion of—Effect on curtesy 267
See CURTESY.

MARRIAGE, PRESUMPTION OF—*Laws and Customs of an uncivilized Community—Insufficient evidence.*] Property was bequeathed to the

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children of *J. A.*, provided he should marry an English lady. *J. A.*, in 1859, married a woman named *Hannah Tuhi Tuhi*, one of the offspring of an alleged marriage between a British subject and a native woman of *New Zealand* named *Tuhi Tuhi*. The only evidence of the marriage was that of the alleged husband himself, who said that he was a British subject, born abroad, in 1801, of British parents. He further said that he came to reside in *New Zealand* in or about 1828, and had resided there ever since; that in 1829 he intermarried with *Tuhi Tuhi*, and that such marriage was solemnized at a place in *New Zealand*, according to the laws, customs, and usages then in force in *New Zealand*; that *New Zealand* was not then a British colony, and there was not then a minister of any Christian church, nor any register of marriages in the island, and that from and after the marriage *Tuhi Tuhi* had lived and still lived with him as his wife.

The deponent did not state the names of his parents. He said that *Hannah*, before her marriage, was called *Tuhi Tuhi*, and not by her father's name, in conformity with the customs of the natives of *New Zealand*; but there was no evidence as to what the laws and customs of the natives of *New Zealand* were:—

Held, that the evidence was insufficient to enable the Court to presume a marriage.

ARMITAGE *v.* ARMITAGE 343

MARRIAGE SETTLEMENT—Maintenance without reference to father's ability 773

See MAINTENANCE.

MARRIED WOMAN *a Contributory—Separate Estate.*] The separate estate of a married woman is bound by her debts, obligations, and engagements, contracted for herself upon the credit of that estate; and whether such obligations were so contracted must be judged of by the circumstances of each particular case.

There is nothing in the nature of a joint stock company, in the absence of any special clauses in the deed of settlement, to prevent a married woman being a shareholder in her own right, so as to bind her separate estate.

Therefore, where a married woman, having separate estate, contracted to take shares in her own name in a joint stock company, which was afterwards wound up:

The Court, being of opinion that such contract was entered into upon the credit of her separate estate, and that the deed of settlement did not exclude married women from being shareholders so as to bind their separate estates, placed the married woman on the list of contributories in her own right, so as to bind her separate estate.

In re LEEDS BANKING COMPANY. MRS. MATTHEWMAN'S CASE. 781

2. ——————— *Specific Performance—Contract affecting her Real Estate.*] By the will of *A.*, made in 1838, real estate was appointed to *B.*, a married woman. By a subsequent will, of 1858, the whole of *A.*'s property, real and personal, was given to *E.*

The will of 1858 was propounded by *E.*, and proof was opposed by *D.*, the heir-at-law of *A.* Issue was joined in the Probate Court, and a trial took place, in the course of which a compromise was come to, the effect of which was, that *E.* gave up his suit, and abandoned all benefit under the will of 1858 in consideration of receiving £15,000 out of the estate. The agreement for a compromise, which was afterwards made a rule of Court, was signed by *E.*, by *C.*, husband of *B.* (who was present in Court, though not a party to the litigation), for himself and wife, and by *X.*, *D.'s* attorney, for *D.* and *B.*, though without any express authority from *B.*:—

Held, that although *B.* had adopted and acted upon the agreement,

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and was enjoying the property under it, *E.*, who was aware of her position as a married woman, and her inability to bind her real estate except in the way prescribed by law, could not enforce it against her, and that, in the absence of such formal ratification, everything that had been done must be regarded as the act of the husband alone.

NICHOLL *v.* JONES 696

MARSHALLING *between Policy Holders and General Creditors—Insurance Company—Winding-up—Shareholder-Creditors—Limit of Liability.*] By the deed of settlement of an insurance company, and by the terms of the policies issued by the company, it was provided that the capital stock and funds of the company should alone be liable to claims in respect of the policies, and that no shareholder should be liable to such claims beyond the amount of the unpaid part of his share in the capital of the company. The company was wound up, and calls to the full amount of the unpaid capital were made, and the proceeds of such calls, together with the other assets of the company, were applied in paying part of the costs of the winding-up, and in paying dividends on the debts due to policy holders and general creditors of the company, *pari passu*:—

Held, that the doctrine of marshalling did not apply, and that no further call could be made upon the shareholders for the purpose of recouping to the policy holders the amount of the capital which had been paid to the general creditors, but that the costs of the winding-up must be borne by the shareholders, and not be paid out of the capital of the company, and consequently a further call must be made, not only to pay the balance of the debts of the general creditors, but also to replace the capital which had been applied in payment of costs.

The deed of settlement of a company, formed under 7 & 8 Vict. c. 110, provided that every shareholder, as between himself and all or any of the other shareholders, should be liable for the debts of the company in proportion to his share and interest for the time being in the funds or property of the company, but not further or otherwise, and that the directors should pay any debt due from the company to a shareholder in the same manner as if such shareholder were an ordinary creditor of the company. The company was wound up, and calls were made to the full amount of the unpaid capital, but the proceeds were insufficient to pay the debts of the company:—

Held, that creditors, who were also shareholders, were entitled to have their debts paid in full (less the amount of the calls to be made for that purpose on their own shares) by means of a further call on the shareholders, and that if any of the shareholders were unable to pay the call, the deficiency must be made up by the other shareholders.

In re PROFESSIONAL LIFE ASSURANCE COMPANY 668

MISREPRESENTATION IN PROSPECTUS—*Rectification of Register.*] The prospectus, which was circulated after the incorporation of a limited company, commenced by stating, in prominent type, that more than half the first issue of 5000 shares had already been subscribed for, applications being invited for the "remaining shares," and that the company had contracted for the purchase of two properties, viz., *A.*, on which "upwards of £70,000 has already been expended by the vendor in buildings and improvements, in addition to the purchase-money paid by him for the land," and *B.*

It appeared that *S.*, who was the person engaged in getting up the company, had contracted to buy estate *A.* for the purpose of selling it to the company; but had not expended any money at all upon the estate, although £70,000, or some such sum, had been laid out by the persons from whom *S.* purchased. He had verbally agreed to purchase

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estate *B.*, but had not signed any written contract. Before the prospectus was issued, and while the terms of it were under discussion, *S.* signed an agreement by which he "subscribed for 2510 shares" in the company, and requested the directors to "allot that number to him or his nominees, in such manner as he might direct at the time of allotment." After the prospectus was issued, *S.*, by his agents, procured applications for shares (including 200 for himself), to an amount exceeding the 2500, or half of the first issue of 5000.

On a bill by one of these applicants (to whom ten shares were allotted), to set aside the allotment on the ground of fraudulent misrepresentations contained in the prospectus; (*a*), as to the subscription for more than half the first issue; (*b*), as to £70,000 having been expended by *S.* upon estate *A.*; and (*c*), as to there being any binding contract for the purchase of estate *B.*:—

Held, that there had been such an amount of misrepresentation upon (*a*), (*b*), and (*c*), by the directors, and by their authorized agent *S.*, for whose statements, having adopted and had the benefit of them, they were responsible, that any contract to take shares entered into on the faith of the prospectus, must be set aside.

Ross *v.* Estates Investment Company 122

2. MISREPRESENTATION IN PROSPECTUS—*Bill by Shareholder on behalf—Fraud—Injunction to restrain Calls—Repayment of Deposit and Allotment Money—Indemnity.*] Bill by shareholder, on behalf of himself and all others except the directors, against the original and present directors, and the company, alleging misrepresentation in a prospectus published by the original directors after registration, on the faith of which Plaintiff took shares, and fraudulent dealings by one of the original promoters with one of the Defendants, whereby such Defendant and his friends, on the occasion of the sale of property by them to the company, came on to the direction; and praying that the present directors and the company might be restrained from enforcing a call, that the original directors might be decreed to repay to the Plaintiff and the other original shareholders the amount of their deposit and allotment money with interest, and to indemnify him and them against all future calls, they offering to deal with the shares as the Court should direct; also to have the arrangements connected with the sale to the company set aside. The alleged misrepresentations were a statement in the prospectus that eleven persons named were directors, of whom it was alleged, first, that three were not at that time and never were, directors, and afterwards (by amendment) that none were ever properly constituted directors: and, secondly, a statement in the prospectus that the company would commence operations with six screw steamships of specified tonnage and rate of speed. The facts were, that all the three persons named were acting as directors when the Plaintiff applied for his shares, but one of them ceased to act before, and the other two shortly after, the allotment of shares to the Plaintiff. At the time when the prospectus was issued the company had no ships, but they had contracts for the supply of two ships. They then entered into the arrangements sought to be set aside by the second part of the bill. The directors were empowered by the articles to commence business, although the whole of the funds of the company should not have been subscribed:—

Held, that a subscriber for shares is not entitled to be relieved from his contract on the ground that after his application, and before allotment, a change has taken place in the direction which has not been communicated to him.

The subscribers to the memorandum of association of a company are, by the *Companies Act*, 1862, competent to act as first directors; and,

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Semble, that acts done by them unanimously are not vitiated by the fact of no meeting being held to sanction them.

The meaning of the second statement in the prospectus having been held to be, that the company did not intend to start till they had the six ships, and that in the event of their obtaining sufficient subscriptions, there was in existence a conditional contract for the supply of six ships of the specified character:—

Held, that this was not such a misrepresentation as went to the essence of the subscriber's contract, he having knowledge of the articles of association, and there being nothing to shew that ships of the specified character might not at any time be purchased in the market; and bill dismissed against the original directors, but without costs.

The Court having further found that the arrangements impeached by the second part of the bill were wholly free from fraud, the bill was dismissed against the subsequent directors, with costs.

HALLOWS *v.* FERNIE 520

3. MISREPRESENTATION IN PROSPECTUS, *Effect of, on winding-up—Contributory.*] Where the directors of a public company had been guilty of fraudulent concealment and misrepresentation of important facts in their prospectus, and the company was in course of winding up:—

Held, that persons who had been induced to take shares and become members by reason of such concealment or misrepresentation, were not entitled to any relief as against creditors, and motions to have their names removed from the register and list of contributories refused.

In re OVEREND, GURNEY, & COMPANY. *Ex parte* OAKES AND PEEK 576

———— 299, 790, 795

See VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM. 1, 2, 3.

MISTAKE, *Devise under—Will—Erroneous Recital—Election.*] Under a settlement, the *four* daughters of a testator took equal shares, subject to his life interest. The testator, by his will, recited that under the settlement, his *two* daughters, *A.* and *B.*, would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done; he then devised to *A.* and *B.* certain estates, and to his two other daughters, *C.* and *D.*, other estates, of much greater value. The will did not purport to affect the settled property:—

Held, that as the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, *C.* and *D.* were not put to their election.

BOX *v.* BARRETT 244

MONEY PAYABLE OUT OF LAND under Statute of Limitations .. 313
See LIMITATIONS, STATUTE OF.

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See TACKING.

MORTMAIN, Bequest for building chapel 757
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See SECRET TRUST.

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NEW ZEALAND—Matrimonial customs 313
See MARRIAGE, PRESUMPTION OF.

"NEXT SURVIVING SON"—*Will—Estate Tail divested by subsequent Clause—"Death" when read as "Death without Issue."*] Testator, after a devise of all his real and personal estate upon trusts for the maintenance and education of each of his children, *John*, *William*, *Benjamin*, *Joe*, *George*, *Tom*, *Jane*, and *Hannah*, until the youngest child, *Hannah*, should attain twenty-one, with a direction to accumulate the residue in the meantime, devised lands *A.* to trustees upon trust for his son *John* and the heirs male of his body; lands *B.* in like manner to his son *William* in tail male; lands *C.* to *Benjamin*; lands *D.* to *Joe*; and lands *E.* to *George*, in tail male respectively. He then directed that "in case any of my said sons shall depart this life during the minority of my said daughter *Hannah* as aforesaid, *or* in the event of any of them dying without having such lawful issue as aforesaid, and either before or after their or his share shall be divisible according to the provisions of this my will," the share or shares of him or them so dying should go, accrue and belong "to my next surviving son according to the seniority of age and priority of birth," in like manner as his or their original shares.

John died in the lifetime of *Hannah*, leaving issue in tail:—

Held, on the construction of the will, that upon the death of *John* his estate tail became divested, notwithstanding his leaving issue, and went over.

The testator having, in the will, correctly arranged the names of his sons in a descending order of birth:—

Held, that by "next surviving son," was meant the "next younger" and not the "next elder" surviving son.

EASTWOOD *v.* LOCKWOOD 487

NOISE, *Nuisance from — Smoke — Effluvia — Substantial Damage.*] Smoke, unaccompanied with noise or with noxious vapour; noise alone; and offensive odours alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

The Court of Chancery will restrain the continuance of a nuisance by injunction, wherever substantial damages might be recovered in respect of it by an action at law.

An injunction granted to restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town: it being proved that such smoke, effluvia, and noise, were a material addition to previously existing nuisances.

CRUMP *v.* LAMBERT 409

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NON-USER of easement 279
See ABANDONMENT OF EASEMENT.

NOTICE *of Assignment of Equitable Interest, to whom to be given—Original and Derivative Trusts—Priority—Mortgage.*] The priority of assignments of the equitable interest in personal estate settled upon such trusts as *A.* shall appoint, and appointed by *A.* to trustees in trust for the assignor, depends upon priority of notice to the trustees of the original settlement, so long as the trust estate is under their control; consequently, a mortgagee of such interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees of the original settlement, was postponed to a subsequent mortgagee without notice of the prior mortgage, who gave notice to both sets of trustees.
BRIDGE *v.* BEADON 664

NOTICE OF DISCHARGE, *Winding-up Order whether—Company—Winding-up—Servant—Salary.*] Although where the business of a company is wholly at an end, a winding-up order may be notice of discharge to the servants of the company from the date of the order; yet where the business is continued after the winding-up, and the former servants are actually employed, the old contract between the company and its servants continues in force, and notice of discharge must be given pursuant thereto.
In re ENGLISH JOINT STOCK BANK. *Ex parte* HARDING .. 341

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See ABANDONMENT OF EASEMENT; NOISE.

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See CHURCH BUILDING ACTS.

ORDER OF NOVEMBER, 1862, Rule 74, Form 54 203
See WITNESS UNDER WINDING-UP.

ORDER, SETTING ASIDE—*Act of Parliament—Investment in Lands—Sanction of Court of Chancery—Fraud on Court—Legal Question.*] Where an investment, under the provisions of an Act of Parliament, has been made in lands, with the sanction of the Court of Chancery, that Court, and not a Court of law, is the proper tribunal to determine a question of title to these lands, depending on the validity of its own orders. The Court will not set aside an order which was made in a matter properly within its cognizance and which has not been appealed against, provided the facts were duly laid before the Court when the order was made; except where the error of the Court is so broad and palpable, that it is manifest that the Court must have miscarried.
HOWARD *v.* EARL OF SHREWSBURY 218

PANELLED PICTURES, Whether fixtures 382
See FIXTURES.

PARISH AND CROWN MANOR, Grant to inhabitants of 103
See CROWN GRANT.

PARSONAGE—*Legacy to be applied in building—Mortmain.*] A legacy to be applied in building a parsonage-house is not within the *Mortmain Act*, if there is glebe land belonging to the living upon which a house may be built.
A., by his will, directed his executors to lay out £1000 "in building the parsonage-house at *C.*, as he had promised the same." There was glebe land belonging to the living of *C.*, but no parsonage-house. Before the will was made, other persons had, at *A.*'s instigation, pur-

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chased land at *C.*, with the intention of dedicating it as a site for a parsonage-house, but had not so dedicated it:—
Held, that the bequest was valid, and not within the *Mortmain Act*.
SEWELL *v.* CREWE-READ 60

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See IMPERFECT ENUMERATION.

PARTNER, Right to trade fixtures erected by mortgagor and 249
See TRADE FIXTURES.

PASTURAGE, Rights of, will revoked by exchange of for land 347
See REVOCATION.

PATENT, Determination of foreign 496
See FOREIGN PATENT.

PATENT CASE, *Certificate for Costs in—Second Trial—Patent Law Amendment Act*, 1852, *s.* 43—*Damages against Purchasers, in addition to Account against Manufacturer—Injunction not suspended pending Appeal.*] The 43rd section of the *Patent Law Amendment Act*, 1852, empowers a Judge, before whom an action is tried, to certify on the record that the validity of the letters-patent in the declaration mentioned came in question; and it is enacted that the record, with such certificate, being given in evidence in any suit or action for infringing the letters-patent, shall entitle the Plaintiff in any such suit or action, on obtaining a decree, to his full costs, charges, and expenses, as between attorney and client, unless the Judge shall certify that he ought not to have such full costs:—
Held, that this section does not apply to the costs of a first trial (whether at law, or of issues of fact in this Court), but only to the costs of a second trial, upon production of the record of the first trial, with the certificate endorsed.
Where bills to restrain the infringement of a patent have been filed against both the person who manufactures and the person who uses the article, and issues of fact have been found for the Plaintiff, it is the right of the Plaintiff to have not only an account against the manufacturer, but also damages against the person using the article, wherever it be found.
After a trial before the Vice-Chancellor, without a jury, in which issues were found for the Plaintiff, a motion for a new trial having been refused by the Vice-Chancellor, and on appeal refused by the Lord Chancellor, was being taken by appeal to the House of Lords.
The Court declined to suspend the final order for an injunction pending the appeal to the House of Lords.
PENN *v.* BIBBY. PENN *v.* JACK. PENN *v.* FERNIE 308

PAYMENT INTO COURT *of Purchase-money—Vendor and Purchaser—Deterioration.*] A railway company having contracted with the ground landlord for the purchase of freehold house property, entered into possession and turned out the weekly tenants, to whom the property was sub-let by lessees under the ground landlord. After the weekly tenants had been turned out, the property was greatly damaged by strangers, who entered forcibly and pulled some of the houses to pieces:—
Held, that the damage, to the deterioration of the property, having been occasioned by the act of the railway company, in entering upon the houses and turning the tenants out of possession, they must pay the purchase-money into Court without being allowed the option of giving up possession.
POPE *v.* GREAT EASTERN RAILWAY COMPANY 171

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See BUILDING SOCIETY. 2.

"PERSONAL REPRESENTATIVES," *Gift to," after Life Estate—Absolute Interest.*] Testatrix directed the interest of £1000 stock to be paid to *D.* for life, and at *D.'s* decease directed the stock to be transferred to *D.'s* personal representatives :—
Held, that *D.* took an absolute interest.
ALGER *v.* PARROTT 328

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POSSESSION, Apportionment of rents up to time of 571
See APPORTIONMENT. 2.

POWER, Appointments under, whether cumulative or substitutionary .. 63
See APPOINTMENTS.

POWER OF SALE IN EXECUTOR—"*Estate*"—*Specific Performance—Vendor and Purchaser.*] *A.*, after commencing his will with the statement that he thereby disposed of "all his worldly estate and effects in manner following," directed payment of his debts, &c., out of his personal estate, and that his executors should sell "all his stocks, shares, and securities, and such other part of his personal estate as was in its nature saleable, and collect and get in all money due and owing to him, and all other his estate, and convert the same into money and stand possessed of the proceeds upon trust to pay debts, funeral and testamentary expenses, and invest the residue thereof upon the trusts therein declared.
After the date of his will, *A.* became possessed of a freehold house. This house was put up for sale by his executrix, who, in the absence of her co-executor (*A.'s* heir-at-law) in *India*, had alone proved the will :—
Held, in a suit for specific performance against the purchaser, that the executrix had power under the terms of the will, to sell the house ; and that the expression of a contrary opinion by one of the conveyancing counsel of the Court was not sufficient to induce the Court to render the title unmarketable by refusing specific performance.
HAMILTON *v.* BUCKMASTER 323

PRACTICE—Jurisdiction as to purchase-money of burial ground taken by railway company 173
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REAL ESTATE OF MARRIED WOMAN, not bound by conduct .. 696
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RECEIVER, Execution against railway company after appointment of .. 541
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RECITAL, Erroneous, election not raised by 244
See MISTAKE.

RECOVERY, DEFECTIVE—*Estoppel of persons claiming under Vendor.*] Where a tenant in tail has entered into a contract for the sale of his estates for value, and in order to convey them to the purchaser, has suffered a recovery which turns out to be technically defective at law,

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the Court will not allow persons claiming under him to take advantage of the flaw.
HOWARD *v.* EARL OF SHREWSBURY 218

RECTIFICATION OF REGISTER—Misrepresentation in prospectus 122, 520
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See TRANSFER OF SHARES. 1, 2.

REVIVOR FOR COSTS ONLY *by Assignees.*] The Court allowed the assignees of a bankrupt Plaintiff to revive the suit for costs only.
FARRALL *v.* DAVENPORT 473

REVOCATION *of Will by subsequent Conveyance—Undivided Rights of Pasturage—Conveyance in Exchange for Land.*] A testatrix, entitled with others to rights of pasture over certain lands, by will, before the *Wills Act*, devised the estate in respect of which her rights of pasture were held. Afterwards, in 1805, she joined with her co-owners of the rights of pasture, and with the owners of the lands over which they extended, in granting the rights and the lands to trustees upon trust to allot and convey the lands amongst the several grantors, and also to make and repair roads, drains, bridges, &c. In 1807 the trustees reconveyed to the testatrix a portion of the lands in lieu of her rights, by a deed to which she was made a party. She died before the execution of the deed:—
Held, that the conveyance in 1805 operated as a revocation of the devise.
Observations on *Lock* v. *Foote* (5 Sim. 618).
GRANT *v.* BRIDGER 347

RIPARIAN OWNER, Rights of 279
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RULE AS TO 45° as a test of obstruction to light 465
See MANDATORY INJUNCTION.

SALARY after winding-up of company 341
See NOTICE OF DISCHARGE.

SALE BEFORE DECREE—*Chancery Amendment Act*, 15 & 16 *Vict.* c. 86, s. 55.] The Court has power, under the 55th section of the *Chancery Amendment Act*, to order a sale before the hearing of a suit, where it is for the protection or benefit of the estate.
TULLOCH *v.* TULLOCH 574

SALE OF EQUITY OF REDEMPTION *to Mortgagee—Bankruptcy of*

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Mortgagor—Undue Influence.] A mortgagor in embarrassed circumstances, in May, 1864, conveyed his equity of redemption in the mortgaged property, under pressure, to the mortgagee, for a sum considerably less than its value, and in June following he was, on his own Petition, adjudicated bankrupt.

On bill by the assignee, the deed was set aside.

Observation on *Hickes* v. *Cooke* (4 Dow. 16).

FORD *v.* OLDEN 461

SATISFACTION *of Covenant by Legacy—Double Portions—Election—Forfeiture.*] A father, upon the marriage of his son, covenanted, by will, or otherwise in his lifetime, to give or assure one-fifth part of the real and personal estate to which he might be entitled at or immediately before his death (subject to the payment thereout of one-fifth of his debts, funeral and testamentary expenses, and legacies) to trustees upon trust to pay the income to the son until (among other things) some event should occur whereby the income would (if the same were thereby made payable to the son absolutely) become vested in some other person or persons; and then upon trusts for the benefit of the son's wife and the issue of the marriage, with a discretionary trust for the benefit of the son after his wife's death. By his will, the father directed his debts to be paid by his executors, and charged them, as far as the law permitted, on all his real and personal estate; and he gave his real and personal estate to trustees in trust for all and every of his children who should be living at the time of his death. The father died leaving five children:—

Held, that the gift in the will did not operate as a satisfaction of the covenant in the settlement so far as the wife and children of the son were concerned; that the trustees were entitled to one-fifth part of the testator's real and personal estate, after payment of his debts, legacies, and funeral and testamentary expenses; that the gift in the will did operate as a satisfaction of all the interest of the son under the settlement; and that the son must, therefore, elect between his life interest under the settlement and one-fifth of the residue which would remain after satisfaction of the covenant.

The son electing to take under the will:—

Held, that such election determined his life interest under the settlement, and that the income became payable to his wife.

MCCAROGHER *v.* WHIELDON 236

SECRET TRUST—*Implied Assent by one of Devisees—Devise in Joint Tenancy.*] A testatrix devised and bequeathed the residue of her real and personal estate, not applicable under her will for the purpose of mortmain, to *A.* and *B.*, his son, as joint tenants. She gave the residue of her property, applicable for the purposes of mortmain, to certain charities mentioned in her will. She died possessed of large property, of which the greater part was realty, or personalty savouring of realty. *A.* was her medical attendant and confidential adviser. On a bill impeaching the devise to *A.* and *B.*, and alleging that the testatrix had intimated her intention of leaving the bulk of her property to charity, and had communicated such intention to *A.*, who had assented to the gift:—

Held (following *Wallgrave* v. *Tebbs* (2 K & J. 313)), that, it appearing from the evidence that *A.* was aware of the residuary gift in the lifetime of the testatrix, and that it was intended by her to be applied for charity, and that either by silence or acquiescence he had led her to suppose that it would be so applied, the gift could not be upheld, and *A.* and *B.* were trustees of the property for the Plaintiffs, the co-heiresses at law, and next of kin.

JONES *v.* BADLEY 635

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SECURITY FOR COSTS *under Companies Act*, 1862, s. 69.] Section 69 of the *Companies Act*, 1862, makes no alteration in the principle upon which the Court refuses to allow a Defendant in a cross suit to call upon the Plaintiff in the cross suit to give security for costs; the principle being—not that the Defendant by suing the Plaintiff originally has admitted the jurisdiction, and cannot afterwards question it, but that a person who, though nominally a Plaintiff, is actually a Defendant, will be allowed freely to defend himself.

Where a company, registered under the Act of 1862, was Plaintiff in a suit to set aside a policy on which the Defendant in the suit had already sued the company in an action at law, which was still pending, the Court refused to order the company to give security, although at the time of the application there was a Petition to wind up the company, under which it was afterwards wound up.

ACCIDENTAL AND MARINE INSURANCE COMPANY *v.* MERCATI .. 200

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See MARRIED WOMAN. 1.

SET-OFF—*Costs of Suit—Judgment Debt—Damages—Costs of Summons.*] Plaintiff, a landlord, was liable to the Defendant, his tenant, for the costs of an injunction suit for alleged breach of covenant, which suit had been dismissed. He had subsequently recovered judgment against the Defendant in an action for rent. He then became liable to the Defendant for damages which had been assessed in Chambers, in respect of the wrongful injunction. He was further entitled to his costs of a summons to vary the certificate for damages taken out by the Defendant, which had failed:—

Held, that he was entitled to set off his judgment debt against the damages, but not against the costs of the suit; and that he was also at liberty to set off his costs of the Defendant's summons to vary against the costs of the suit.

THROCKMORTON *v.* CROWLEY 196

2. ——— *after Winding-up—Companies Act*, 1862.] *A.* being under liability to a bank upon his acceptance, to fall due in July, 1866, took, in the ordinary course of business, an acceptance of the bank. This acceptance fell due and was dishonoured on the 10th of June, and on the 23rd of June an order was made for winding-up the bank, *A.'s* acceptance having matured in the hands of the official liquidator:—

Held, that *A.'s* right of set-off was not interfered with by the winding-up order.

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See FRAUDULENT TRANSFER.

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SHARES, CONTRACT FOR PURCHASE OF—*Custom of Stock Exchange—Specific Performance.*] The Plaintiffs, dealers in shares, contracted to sell to the agents of the Defendant shares which they had purchased from, and which remained registered in the name of, *C.* On the settling day the agents of the Defendant gave his name, as principal, for insertion in the deeds of transfer. Transfers executed by *C.* to the Defendant were delivered to Defendant's agents, who paid for the shares out of money given to them by the Defendant. The Defendant refused to execute the deeds and to procure their registration, on the grounds that he told his agents that he intended to resell without taking a transfer, and that they had given his name without authority. Five months after the sale, the company was ordered to be wound up, and on bill for specific performance and indemnity (filed before the winding-up), to which *C.* was not a party :—

Held, that Plaintiffs were entitled to a decree for specific performance, and that Defendant should execute transfers, and procure his name to be registered.

PAINE *v.* HUTCHINSON 257

SHERIFF, Interpleader by 806
See INTERPLEADER BY SHERIFF.

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SPECIFIC PERFORMANCE—*Decree on Vendors' Bill when no Title found—Lien for Deposit and Costs.*] Where, in a suit by vendor for specific performance, it was certified that a good title was not deduced, the Court ordered a return to the Defendant of his deposit-money, with interest at 4 per cent., and declared the Defendant entitled to a lien on the estate for the same, and also for his costs, with liberty to apply ; and, subject thereto, dismissed the bill.

TURNER *v.* MARRIOTT 744

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See GIFT, ORIGINAL OR SUBSTITUTIONARY.

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See FORFEITURE. 2.

"SURVIVING" *read as "other."*] Testator gave the clear surplus of the rents of his real and leasehold estates, upon trust, after payment of one-fourth to his wife for life, and providing for the maintenance and education of his children, and for the payment of a debt, to be laid out at interest to accumulate till his eldest daughter should attain twenty-one, and then a third part to be paid to her; the other two-third parts to continue accumulating till his second daughter should attain twenty-one, and then a third to be paid to her; the remaining third to be paid to his youngest daughter on her attaining twenty-one. In case any one or more of his three daughters should die under twenty-one and have no issue, then he directed the share or shares of such one or more so dying to be paid *to his surviving daughters or daughter*. He directed his trustees, when and as each of his daughters should attain twenty-one, or marry, *to convey* to each of them one-third part of all his real and leasehold property for her life, for her sole and separate use, with power for such daughter, by her will, to give her third to all, or one or more of her children, as she should think proper; and in default of gift by such will, each such part to go to her children equally as tenants in common, in fee. In default of issue of any one or more of his daughters, testator directed the share or shares of such one or more dying without issue to be limited so as to go *to her surviving sisters* and to their issue, in like manner as their original third parts were directed to be conveyed to each of them. And in case all his three daughters should die without issue in the

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lifetime of their mother, then testator gave his real and leasehold estates, or the yearly income thereof, to his wife for her life, and afterwards over. He also directed that, in such conveyances to be made to his daughters, all necessary trustees and trusts should be inserted therein, for the purpose of protecting the entail and succession designed by him to be effected upon his three daughters, and the issue of them:—

Held, upon the construction of the whole will, that the testator did not intend to exclude children of a daughter first dying from participation in the share or shares of a daughter or daughters afterwards dying under twenty-one without issue; and that to carry out the intention the word "surviving" must be read "other."

HURRY *v.* MORGAN 152

TACKING *of further Advance to pretended Owner.*] A testator, in 1832, devised his copyhold estate, which was subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate, and the original mortgage being transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860:—

Held, that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance.

YOUNG *v.* YOUNG 801

TAPESTRY, Whether fixtures 382
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See ANNUITY.

TENANT FOR LIFE AND REMAINDERMAN, Fixtures as between. 382
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———————————————, Rights of, to timber-money 398
See TIMBER.

TESTAMENTARY POWER—*Power to Tenant for Life to appoint at her decease—Power to appoint at decease of Donee, whether exercisable by Deed.*] A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such a distribution and disposal of his then remaining property among his children as might seem just and equitable, according to her discretion":—

Held, a power to the wife, exercisable by will only, to appoint in favour of the testator's children living at her death.

FREELAND *v.* PEARSON 658

TESTIMONY, *Bill to perpetuate pending suit, against Plaintiff.*] A bill to perpetuate testimony relating to a matter which is the subject of an existing suit against the Plaintiff is demurrable, although the Plaintiff could not himself have made such matter the subject of present judicial investigation.

EARL SPENCER *v.* PEEK 415

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TIMBER—*Waste—Tenant for Life and Remainderman—Statute of Limitations—Delay—Acquiescence.*] If a tenant for life, impeachable for waste, cuts timber, and converts the proceeds to his own use, although the timber is such as the Court, if applied to, would order to be cut, the *Statute of Limitations* begins to run against the right of the remainderman to recover the proceeds of the timber from the time of the cutting, and not from the death of the tenant for life.

In 1831, *A.*, tenant for life, impeachable for waste, with remainder to his son, *B.*, an infant, in fee, cut timber and received the proceeds. *B.* came of age in 1834, lived with, and was in partnership with, *A.* for some years, and died intestate in 1844, leaving *C.* his only child. *A.* died in 1864, *C.* came of age in 1865, took out administration to *B.*, and in 1866 filed a bill against *A.'s* executor for an account of the proceeds of the timber :—

Held, that the right of suit accrued to *B.* in 1834, and, consequently, that *C.'s* claim as his representative was barred by the statute :

Held, also, that independently of the statute, the Court would presume that *B.'s* claim had been settled between him and *A.*

SEAGRAM *v.* KNIGHT 398

TIME, Enlargement of in arbitration 261
See ARBITRATION.

TRADE FIXTURES—*Mortgage—Partnership.*] Trade fixtures affixed to mortgaged freehold premises, after the mortgage, by the mortgagor and his partner, occupying the premises for the purpose of their trade, pass to the mortgagee.

Ex parte Cotton (2 M. D. & D. 725) followed.

CULLWICK *v.* SWINDELL 249

TRANSFER, Relief against fraudulent 274
See FRAUDULENT TRANSFER.

TRANSFER OF SHARES—*Unnecessary Delay of Registration by Company—Companies Act*, 1862, *s.* 35—*Contributory.*] A transfer of shares in a company was executed by both parties, left at the office for registration, and approved by the director whose duty it was to inspect transfers, on the 28th of February, 1866, and would, according to the ordinary practice of the company, have been confirmed at the next meeting of the directors, which was held on the 1st of March, and registered ; the directors did not confirm it at that meeting, and, on the 3rd of March, the company being insolvent, they resolved that no transfers then in the office should be registered without their express sanction ; the transfer was not registered, and the company was soon afterwards ordered to be wound up :—

Held, that as the transfer was not registered on the 1st of March, there was unnecessary delay in registering it within the meaning of the 35th section of the *Companies Act*, 1862 ; that the resolution of the 3rd of March could not affect a transfer which ought to have been previously registered ; and that the transferor was entitled to be in the same position as if the transfer had been registered on the 1st of March, and could not be placed on the list of contributories. *Shepherd's Case* (Law Rep. 2 Eq. 564 ; 2 Ch. 16) distinguished.

In re JOINT STOCK DISCOUNT COMPANY. NATION'S CASE .. 77

2. ——————— *Delay by Vendor in procuring Registration —Companies Act*, 1862, *s.* 35—*Contributory.*] The registered owner of certain shares in a company executed a transfer of them to a purchaser two years before the date of a winding-up order ; but took no steps to procure the transfer to be registered ; a winding-up order having been made :—

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Held, that his name could not be removed from the register under s. 35 of the *Companies Act*, 1862, or from the list of contributories.

Ward's Case (Law Rep. 2 Eq. 226), explained.

In re CONTRACT CORPORATION. HEAD'S CASE. WHITE'S CASE. 84, 86

TRUST, DECLARATION OF, by voluntary assignment of promissory notes 686
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TRUST OR POWER for maintenance 773
See MAINTENANCE.

TRUST, SECRET, Implied acceptance of 635
See SECRET TRUST.

TRUSTEE FOR COMPANY *a Contributory—Rectification of Register—Indemnity.*] Shares in a company were transferred into the name of *A.*, with his consent, to be held by him as a trustee for the company.

Held, that, although a person wrongfully put upon the register would have a right to relief, even as against creditors, *A.*'s name having been placed by his own consent upon the register, he was liable as a contributory, although he might have a right to be indemnified by the company for any payments made by him in respect of the shares, of which he was merely a trustee.

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION. CHAPMAN AND BARKER'S CASE 361

TRUSTEE RELIEF ACT, Costs under 432
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See MARRIAGE, PRESUMPTION OF.

UNITED STATES, Must join an officer as co-Plaintiff 724
See FOREIGN STATE.

UNREASONABLE REFUSAL of license to assign 746
See COVENANT NOT TO ASSIGN.

VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM—*Recovery of Deposit—Principal and Agent—Jurisdiction—Excess of Authority—Trust.*] Where a Plaintiff—having been struck off the register of a company by an order of the Court, on the ground of excess in the objects of the company, as shewn by the memorandum registered after he became a member, over those stated in a prospectus on the faith of which he took shares—filed a bill for the return of his deposit money against the directors who issued the prospectus, and the company, not alleging fraudulent intention:

Demurrer by the company allowed, on the ground that the money in their hands was not impressed with a trust:

Demurrer by the directors allowed, on the ground that mere excess of authority by an agent does not constitute equitable fraud, and that any relief in such case must be at law.

STEWART *v.* AUSTIN 299

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2. VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM—*Rectification of Register—Delay.*] A shareholder having, in August, 1865, given notice of his resolution to retire from the company, and to have his deposit money returned immediately, on the ground of a discrepancy between the articles of association and the prospectus (which discrepancy was corrected in the September following), took no further step till March, 1866, but paid a call in the meantime, and then wrote demanding the return of his allotment money, on the ground of a new discrepancy, of a totally different character, which he had only just discovered. On motion by the shareholder to have his name removed from the list:—

Held, that, having put himself at arms' length with the company in August, 1865, he must be taken then to have known all the grounds of objection on which he intended to rely, and motion refused.

In re RUSSIAN (VYKSOUNSKY) IRONWORKS COMPANY. WHITEHOUSE'S CASE 790

3. ———— *Rectification of Register—Delay.*] *A.*, a shareholder, on the 2nd of July, gave notice to the company that, unless within three days steps were taken to remove his name from the register, he should apply to the Court. The directors on the next day (3rd of July, 1866) replied that they should oppose his application. *A.* left town without taking any further steps, and on his return, about the end of August, finding that his name was still upon the register, he stated that he should apply to the Court as soon as the Long Vacation was over:—

Held, that the delay between the 3rd of July and the beginning of the Long Vacation was fatal to *A.'s* application; although, having regard to a subsequent course of negotiations, between the 30th of October, 1866, and the 8th of March, 1867, from which he was led to suppose that the company would themselves remove his name, *A.'s* application, though refused, was refused without costs.

In re RUSSIAN (VYKSOUNSKY) IRONWORKS COMPANY. TAITE'S CASE 795

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VESTING by defeasible gift of income, followed by gift of principal .. 315

See INCOME.

VOLUNTARY DEED, *Gift by, whether complete—Promissory Notes, not indorsed over—Declaration of Trust.*] *E.* by a voluntary deed, in 1858, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever," of her, the said *E.*, to *R.* absolutely; and she thereby appointed *R.*, his executors, administrators, and assigns, her attorney and attorneys in her name, but for the sole benefit of *R.*, to sue for and recover the thereby assigned premises and every part thereof, and to do and execute all such acts and deeds as should be necessary for deriving the full benefit of the

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assignment thereby made. At the date of the assignment, *E.* was possessed of (amongst other property) certain promissory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon *R.*'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by *E.* to *R.*:—

Held, that the property in the notes passed by the deed to *R.*, on the principle that the deed of assignment operated as a complete declaration of trust by *E.* of all her property in favour of *R.*

RICHARDSON *v.* RICHARDSON 686

VOLUNTARY WINDING-UP—*Order after Dissolution of Company—Jurisdiction—Companies Act*, 1862, *ss.* 142, 143.] The Court has jurisdiction to make an order in the matter of the voluntary winding up of a company under the *Companies Act*, 1862, after the expiration of three months from the date of the registration of a return by the liquidators of a meeting having been held in pursuance of the 142nd section of the Act, if the application for such order is made before the expiration of the three months:

Semble, the dissolution of a company under the 143rd section does not deprive the Court of its jurisdiction over such company under the Act.

In re CROOKHAVEN MINING COMPANY 69

WASTE by cutting timber 398
See TIMBER.

WASTING OF ASSETS—*Next of Kin—Refunding.*] Where one of several residuary legatees or next of kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*, if the wasting has taken place before such share was received.

In the latter case, the burden of proof lies on those who call upon the residuary legatee or next of kin to refund, to shew that the wasting took place before the share was paid over.

PETERSON *v.* PETERSON 111

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——————— Practice as to summoning witness 203
See WITNESS UNDER WINDING-UP.

WINDING-UP OF INSURANCE COMPANY—Marshalling 668
See MARSHALLING.

WINDING-UP ORDER *against a fraudulent Company—Companies Act*, 1862, *s.* 79.] The articles of a company adopted an agreement whereby 240 paid-up shares were to be delivered to the manager "for his own use, and in order to supply him with the means for commencing the duties of management, and for discharging obligations incurred by him in promoting the formation of the company." The Petitioner, in reply to an advertisement for a secretary, announcing that he would be required to invest £240, applied for and obtained the appointment, and paid £240 for shares in the company. He then discovered a second agreement, whereby the manager had agreed, as soon as he should receive the 240 shares, to give to each of the four promoters who had signed the first agreement on behalf of the company, and who were named directors in the articles, forty shares, that being the number of shares necessary for the qualification of directors. Only one promoter and director out of the seven promoters (five of whom were named directors) who signed the memorandum, six of them for forty shares, and one for ten, had paid anything in respect of his shares, and there were only six other shareholders.

Upon Petition for winding up the company, although presented within three months of the date of incorporation, the Court, upon the above facts, made the order.

In re LONDON AND COUNTY COAL COMPANY 355

——————————— Whether notice of discharge 341
See NOTICE OF DISCHARGE.

WITNESS UNDER WINDING-UP, *Mode of summoning—Companies Act*, 1862, *s.* 115—*Orders of November*, 1862, *Rule* 74, *Form No.* 54.]

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Where a company is being wound up under the *Companies Act*, 1862, and a special examiner has been appointed, the proper mode of summoning before the examiner "any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," under the 15th section of the Act, is, not by subpœna, but by summons in Chambers.
In re ENGLISH JOINT STOCK BANK 203

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